84-657 (1)

No. 84-

Office - Supreme Court, U.S.
FILED
OCT 24 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

A divided panel of the United States Court of Appeals for the Second Circuit affirmed a judgment of the District Court for the Southern District of New York dismissing an action brought by petitioner Bankers Trust Company pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, on the ground that a civil claim for damages under RICO will not lie if plaintiff's injuries were caused by the criminal acts through which defendants' enterprise was conducted.

The Court of Appeals' decision presents the following questions:

Does RICO provide a civil remedy for a person injured by the conduct of an enterprise through a pattern of racketeering activity if his injury is caused by some of the criminal acts through which the enterprise is operated?

PARTIES TO THE ACTION

Petitioner, plaintiff below, is Bankers Trust Company ("Bankers"). A list of Bankers' parent company, subsidiaries and affiliates is set forth in the Appendix to this petition for a writ of certiorari ("App.") at App. 135.

The respondents, defendants below, are set forth in the caption. They are Milton Braten ("Braten"), an officer and principal shareholder of Braten Apparel Corporation ("BAC"); Daniel Rhoades ("Rhoades"), an officer of BAC and an attorney for BAC and Braten; Herman Soifer ("Soifer"), a shareholder of BAC; and a number of entities owned and controlled by the individual respondents.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE ACTION	ii
TABLE OF CASES AND AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTIONAL GROUNDS	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Summary of Facts	2
B. Summary of Argument	3
C. The Facts of This Case	4
i. The Bankruptcy Frauds—1974-1977	4
ii. The Bankruptcy Frauds—1982	6
iii. The Bribery	7
D. This Action	8
FEDERAL JURISDICTION OVER THIS ACTION	8
REASONS FOR GRANTING THE WRIT	8
I. THE SECOND CIRCUIT'S STANDING REQUIREMENTS FIND NO SUPPORT IN THE LANGUAGE OR HISTORY OF THE ACT	11

PAGE

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THOSE OF OTHER CIRCUITS 18

CONCLUSION..... 22

TABLE OF CASES AND AUTHORITIES

Cases PAGE

Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984) 19, 20-1

Alexander Grant and Co. v. Tiffany Industries, Inc., [1984] Fed. Sec. L. Rep. (CCH) ¶ 91,671 (8th Cir. 1984) 19n., 20

Bankers Trust Company v. Feldesman, et al., 566 F. Supp. 1235 (S.D.N.Y. 1983), *aff'd sub nom. Bankers Trust Company v. Rhoades, et al.*, 741 F.2d 511 (2d Cir. 1984) 2, 8, 10, 19, 21

Bennett v. Berg, 685 F.2d 1053 (8th Cir.), *aff'd* 710 F.2d 1361 (8th Cir. 1983) (*en banc*), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983) 19

In re Braten Apparel Corporation, 21 B.R. 239 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 B.R. 1009 (S.D.N.Y. 1983) *aff'd*, (2d Cir. September 1, 1983) (n.o.r.) 3, 6

Bunker Ramo v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) 19, 20

In re Cantanella, 583 F. Supp. 1388 (E.D. Pa. 1984) ...20, 21

Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984) 9, 10, 15, 19n., 21

Grado v. Gross, [1984] Fed. Sec. L. Rep. (CCH) ¶ 91,660 (D. Mass. 1984)..... 21

Haroco, Inc. v. American National Bank & Trust Company, No. 83-2529 (7th Cir. Oct. 19, 1984) 10, 11, 14, 18, 19, 19n., 20, 22

Johnsen v. Rogers, 551 F. Supp. 281 (C.D. Calif. 1982) 20

Kirshner v. Cable/Tel Corp., 576 F. Supp. 234 (E.D. Pa. 1983)..... 21

PAGE

In re Longhorn Securities Litigation, 573 F. Supp. 255 (W.D. Okla. 1983) 21

Morosani v. First National Bank, 581 F. Supp. 945 (N.D. Ga. 1984) 21

Ralston v. Capper, 569 F. Supp. 1575 (E.D. Mich. 1983) 21

Russello v. United States, 104 S.Ct. 296 (1983).....8, 15, 16

Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied sub nom. Arthur Andersen and Co. v. Schacht*, 104 S. Ct. 508 (1983) 9, 18, 19

Sedima, S.P.R.L. v. Imrex Company, Inc., 741 F.2d 482 (2d Cir. 1984) 9, 10, 17, 19n., 20, 21, 22

Seville Industrial Machinery Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146 (D.N.J. 1983), *rev'd on other grounds*, No. 83-5575 (3d Cir. September 5, 1984) 21

Slattery v. Costello, 586 F. Supp. 162 (D.D.C. 1983)... 21

Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648 (7th Cir. 1984) 19, 20

United States v. Turkette, 452 U.S. 576 (1981) 15, 16, 18

Willamette Savings & Loan v. Blake & Neal Finance Co., 577 F. Supp. 1415 (D. Ore. 1984) 20

Statutes and Legislative Materials

11 U.S.C. § 786 5

18 U.S.C. §§ 1961 *et. seq.* .....*passim*

18 U.S.C. § 1961(5) ..... 11n.

18 U.S.C. § 1962 .....3, 11, 12

18 U.S.C. § 1962(c) 4, 11

18 U.S.C. § 1964(c) 3, 8, 9, 11, 12, 15, 16, 17, 18

PAGE

P.L. 91-452, § 904(a) (1970) 9

Statement of Findings, 84 Stat. 922..... 15

28 U.S.C. § 1254(1) 2

S. 2048 and S. 2049, 90th Cong., 1st Sess. 79 (1967)... 16

113 Cong. Rec. 17,999 (1967) (Statement of Senator Hruska) 16

S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).....15, 16

S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995 (1969) 15, 16

116 Cong. Rec. 18,913 (1970) (Remarks of Senator McClellan) 16

Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 538 (1970) 16

116 Cong. Rec. 25,191 (1970).....16-17, 17n.

116 Cong. Rec. 35,196 (1970)..... 17

116 Cong. Rec. 35,295 (1970)..... 17

116 Cong. Rec. 35,344 (1970)..... 17

116 Cong. Rec. 36,296 (1970)..... 17

116 Cong. Rec. 37,264 (1970)..... 17

Other Authorities

A RICO CRISIS—2d Circuit Rulings Sharply Curb Civil Actions, The National Law Journal, August 13, 1984, at p. 1, col. 3..... 10n.

Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982)... 13

G. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982)..... 17

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Bankers Trust Company, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 26, 1984, on the ground that this case presents an issue of substantial importance as to which there is a conflict in the courts of appeals.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are reproduced at

App. 3 and 18. The decision of the district court, reported *sub nom. Bankers Trust Company v. Feldesman*, 566 F. Supp. 1235 (S.D.N.Y. 1983), is reproduced at App. 33.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the court of appeals was entered on July 26, 1984. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§ 1961 *et seq.* (1978), are reproduced at App. 128.

STATEMENT OF THE CASE

A. Summary of Facts

Respondents' unlawful conduct is appalling. As the dissent below said, "if civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." (App. 19)

Bankers' complaint describes a plethora of criminal activities committed by the individual respondents in their thus-far successful effort to retain monies loaned by Bankers to Braten Apparel Corporation ("BAC"). The respondents' racketeering activities began in 1974, in preparation for BAC's fraudulent bankruptcy, and continued through and after BAC's bankruptcy proceedings, with numerous bankruptcy offenses and other abuses of the judicial system, including corruption of a state judge.

The acts of bankruptcy fraud committed by respondents between 1974 and 1976 enabled BAC to obtain, in 1976, a discharge in bankruptcy of the debt owed to Bankers. That discharge, however, was revoked by the bankruptcy court in 1982 after a trial at which the individual respondents' fraud

was proven. Some of those acts of bankruptcy fraud are detailed in the opinions of the bankruptcy court and district court in *In re Braten Apparel Corporation*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 B.R. 1009 (S.D.N.Y.), *aff'd*, September 1, 1983 (n.o.r.) (2d Cir. 1983).

Despite the order of revocation and the findings of fraud, Bankers remained unable to collect its claim. During the trial in the revocation case, respondents committed another series of bankruptcy offenses, again fraudulently transferring and concealing the valuable assets of BAC.

Respondents have used a network of corporations and secret trusts to defraud and attack legitimate businesses for ten years, through the series of offenses described below. Their illegitimate profits have been manipulated, through various channels, to enrich the individual respondents and to finance new schemes. Remedies usually effective against ordinary businesses and businessmen have proved worthless against respondents' readiness to flout the law. If RICO does not provide a remedy here, it never will.

B. Summary of Argument

The district court expressly found (App. 41), and the court of appeals did not question, that Bankers had alleged all the elements of a violation of RICO's section 1962. The district court also found that the respondents' alleged actions "strongly suggest a sinister scheme to defraud [Bankers] and other creditors of the monies they lent." (App. 46). The court of appeals agreed that Bankers was injured in its business by the respondents' conduct. (App. 13)

Based upon the language of the statute and Congress' underlying purposes, Bankers clearly stated a claim under RICO's private civil remedy provision, 18 U.S.C. § 1964(c). Nonetheless, the majority below concluded that Bankers could not sue. The majority held that injury caused by the criminal acts through which an enterprise is operated is not remediable under RICO. Rather, the majority concluded, there had to be some "distinct" injury caused by the "pattern" of those acts.

Bankers submits that the court of appeals erred in three respects and that its ruling will, unless reversed, destroy RICO's private civil remedy and thwart Congress' intention in enacting RICO.

First, section 1962(c) prohibits the *conducting* of an enterprise through a pattern of racketeering activities—to consider the "pattern" to be the targeted offense, as the majority below did, misconstrues the statute's language and purpose. Congress' target was not abstract patterns. Section 1962(c) was aimed at people who conduct enterprises through two or more enumerated criminal acts. To permit victims of such acts to sue only for indirect or "distinct" injuries caused by the "pattern" cuts the heart out of the statute.

Second, even assuming the "pattern" of acts could be deemed the offense, no real distinction can be drawn between, on the one hand, injuries caused by the criminal acts and, on the other hand, injuries caused by the "pattern" consisting of those acts.

Third, in any event, the majority below erred in imposing a mechanical rule that one injured by acts of racketeering activity cannot also be deemed to have been injured by the "violation" of section 1962(c).

The Second Circuit's decision conflicts with decisions of at least three other courts of appeal (the Fifth, Seventh and Eighth) and of numerous district courts, which have upheld civil RICO claims based on injuries resulting directly from racketeering activities. Moreover, the federal courts have split into at least four different camps in attempting to define the injury remediable by RICO. A ruling from this Court is necessary to eliminate the current chaos and permit RICO to be given its intended scope and effect.

C. The Facts of This Case

(i) *The Bankruptcy Frauds—1974-77*

In August 1974, at a time when BAC owed Bankers more than $4 million, defendants Braten and Soifer (and others)

began their scheme to put BAC into bankruptcy and obtain a discharge of its indebtedness, while preserving its most valuable assets for themselves. They agreed that Soifer would assume the apparent ownership of BAC's principal asset—a recently acquired wholly-owned subsidiary with a net value of $3.4 million named Brookfield Clothes, Inc. ("Brookfield"). After Soifer assumed the apparent ownership of Brookfield, BAC would seek reorganization under Chapter XI of the then-applicable Bankruptcy Act of 1898 and, upon discharge of BAC's indebtedness, Soifer would return Brookfield to BAC.

To implement the scheme, a sham agreement was executed making it appear that BAC had lost Brookfield to Soifer. The misrepresentations (to the creditors and to the bankruptcy court) about the ownership of Brookfield continued throughout BAC's proceeding, including, *inter alia,* in BAC's Chapter XI petition, in testimony given by the individual respondents, in financial statements distributed to BAC's creditors, and in other sworn and unsworn documents and statements. These numerous acts of bankruptcy fraud are outlined in the majority opinion below (App. 6-8). As a result of these offenses, Bankers and the other creditors were induced to accept, and the bankruptcy court was induced to confirm, a Chapter XI plan of arrangement under which BAC was relieved of more than $4.3 million in debt.

Within a few months of the confirmation of BAC's plan of arrangement Soifer returned Brookfield to BAC, and Soifer, Braten and Rhoades constructed a network of corporations and other entities through which BAC's assets were distributed.

When some of these facts began to surface, Bankers commenced a proceeding to revoke the confirmation of BAC's arrangement on the ground that it had been fraudulently procured. See 11 U.S.C. § 786 (1976). Following a lengthy trial, on June 25, 1982 the bankruptcy court expressly found that BAC's bankruptcy proceeding had been infected with fraud—fraudulent transfer, fraudulent concealment, false testi-

mony and sworn pleadings—and revoked the order of confirmation. *In re Braten Apparel Corp.*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982). This decision was affirmed by the district court, 26 B.R. 1009 (S.D.N.Y. 1983), and the district court's decision was affirmed by the Second Circuit.

The revocation order restored to Bankers its claims against BAC. Respondents, however, had perpetrated yet another scheme to frustrate collection of that debt.

(ii) *The Bankruptcy Frauds—1982*

In its June 25, 1982 decision revoking BAC's fraudulently procured confirmation, the bankruptcy court stated that BAC should offer to its creditors a new and "realistic" plan "in light of the fact that the debtor owns a valuable asset—Brookfield." *In re Braten Apparel Corporation,* 21 B.R. at 263. The bankruptcy court, however, had been deceived again. After the revocation trial had concluded, but before the decision was rendered, respondents had embarked on a new scheme designed once again to shield BAC's assets from creditors, and to frustrate the coming adverse finding by the bankruptcy court.

The new scheme was similar to the earlier scheme—respondents stripped BAC for a second time of the stock of Brookfield. This time, however, respondents went one step further to insulate the assets—they stripped Brookfield itself of assets.

In January 1982, one of the corporations controlled by the individual respondents obtained almost $9 million from KB Business Credit, Inc. ("KBBC"), and disbursed these funds to several of the corporate respondents herein. When KBBC was not repaid, it sued Braten, Rhoades and several of the corporate respondents. Respondents settled the lawsuit (and avoided personal liability) by having BAC, for little or no consideration, convey the stock of Brookfield to another of respondents' corporations, which then pledged the stock to KBBC.

At or about that time, Brookfield itself was stripped and its assets disbursed to the respondents. Brookfield had been

phenomenally successful, had paid out millions of dollars to the other respondents, and still had a substantial equity in early 1982. However, shortly after the bankruptcy court rendered its revocation decision in June 1982, Brookfield was found to be insolvent. Thus, respondents had taken no chances that BAC's creditors would be able to reach Brookfield or its assets; they conveyed away Brookfield and stripped it of its assets.

(iii) *The Bribery*

During the period 1974-1976, respondents and their affiliates instituted a series of frivolous multi-million dollar lawsuits against Bankers in New York State court, designed to hinder Bankers' collection of the debt owed to it.

Although those New York suits were still pending, in 1977 BAC commenced a similar action against Bankers, this time in South Carolina. In another South Carolina proceeding, Braten asserted claims, adverse to Bankers, to certain escrow funds. Rhoades was of counsel to a South Carolina law firm representing BAC and Braten in both South Carolina cases.

While these cases were pending before Judge William H. Ballenger, Rhoades used a South Carolina corporation formed by him to purchase or assume a defaulted mortgage on which Judge Ballenger was personally liable to the extent of $100,000. Judge Ballenger rendered decisions favorable to BAC and Braten, including: (1) appointing a former partner of the South Carolina attorney to whose firm Rhoades was counsel as special referee in the escrow action, with the power to deprive Bankers of a jury trial, and (2) denying Banker's motion to dismiss BAC's $195 million damage action.

After the transactions involving Rhoades' corporation and the Judge's corporation came to light, the Judge recused himself from the escrow action, citing a possible conflict of interest, the special referee resigned, and the Judge's denial of Bankers' motion to dismiss BAC's damages action was reversed as an abuse of discretion. Bankers had expended over $100,000 in legal fees in those cases.

D. This Action

Bankers commenced this action under RICO in August 1982, shortly after it was discovered that, notwithstanding the bankruptcy court's June 25, 1982 revocation of BAC's fraudulently procured confirmation, respondents had again frustrated the bankruptcy process by, again, fraudulently rendering BAC assetless. Before any discovery, the district court dismissed Bankers' complaint on the pleadings, opining that RICO required a "competitive" or antitrust type injury. *Bankers Trust Company v. Feldesman,* 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (App. 44). The Second Circuit disagreed with the district court's reasoning (App. 14n.6), but nevertheless affirmed for different reasons.

FEDERAL JURISDICTION OVER THIS ACTION

This action arises under Title IX of the Organized Crime Control Act of 1970, P.L. 91-452, codified at 18 U.S.C. § 1961 *et seq.* Federal jurisdiction over civil claims arising thereunder is conferred by 18 U.S.C. § 1964(c).

REASONS FOR GRANTING THE WRIT

The issue presented in this case is one of national significance; its resolution will determine whether Congress' goal of combating the organized, systematic criminal conduct infecting our society can be furthered by private parties, such as Bankers, who have been victimized by such conduct. This Court's decision will also resolve multiple conflicts among the lower federal courts as to the scope of civil RICO.

The primary purpose of RICO is not in question—"the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 104 S.Ct. 296, 302 (1983). Included in this arsenal, and potentially the most forceful weapon of all, is a provision permitting victims of

RICO violations to sue in federal court to recover treble damages for their injuries. 18 U.S.C. § 1964(c). This provision has never before been considered by this Court.

Congress, faced with a widespread and multi-faceted problem, drafted RICO in broad terms, and directed that RICO "shall be liberally construed to effectuate its remedial purposes." P.L. 91-452, § 904(a). Congress was aware of the far-reaching implications of RICO's civil scope; nevertheless, "Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship." *Schacht v. Brown*, 711 F.2d 1343, 1354-55 (7th Cir.), *cert. denied sub nom. Arthur Andersen and Co. v. Schacht*, 104 S.Ct. 508 (1983).

The Second Circuit, alone among the circuits that have considered RICO's private civil remedy, has in effect concluded that because RICO is being used in circumstances the Second Circuit deems to be inappropriate, its use will be prohibited in virtually every case.

During the week of July 23, 1984, the Second Circuit filed opinions in three civil RICO cases.[1] In *Sedima, S.P.R.L. v. Imrex Company, Inc.* (App. 48) the majority (Judge Cardamone dissenting) held that a civil RICO claim could only be brought for "mobster" type injury. The majority in the instant case, by contrast, held that RICO's civil remedy did not apply unless the victim's injury was wholly independent of any injury caused by an "act of racketeering activity." A unanimous panel in *Furman v. Cirrito* (App. 107) disagreed with the previous two decisions, but abided thereby. *Furman v. Cirrito* also revealed that the Second Circuit had *sua sponte* considered and denied rehearing *en banc* of these cases (App. 109). Taken

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1 Along with this petition, petitions for certiorari are being filed in the other two civil RICO cases decided by the Second Circuit, presenting similar questions for review.

together, the three decisions reveal a serious dispute within the Second Circuit as to the meaning and breadth of civil RICO.[2]

In the instant case, and in *Sedima*, the Second Circuit engrafted onto the statute a set of irrational and insurmountable obstacles to the use of civil RICO. The Second Circuit's decisions find no support in the language or history of the statute. In the words of the panel in *Furman v. Cirrito*, the standing requirements adopted in *Sedima* and in this case would "sterilize civil RICO as a weapon against the conduct Congress sought to curtail." (App. 119)

No other court of appeals has erected such barriers to civil RICO claims, and several other circuits have sustained RICO actions that could not pass muster under the Second Circuit's formulation. There is little doubt that the Fifth, Seventh and Eighth Circuit Courts of Appeals would give Bankers its day in court on the facts of this case. Just four days ago, the Seventh Circuit expressly repudiated the Second Circuit decisions in this case and *Sedima*, holding, "We adhere to our prior decisions and those of other circuits, and we reject the Second Circuit's imposition of a racketeering injury requirement. We conclude that a civil RICO plaintiff need not allege or prove injury beyond any injury to business or property resulting from the underlying acts of racketeering." *Haroco, Inc. v. American National Bank & Trust Company*, No. 83-2529 (7th Cir. Oct. 19, 1984), slip op. at 28.

For these reasons, as amplified below, Bankers respectfully submits that this case presents a critical issue deserving of review by the Supreme Court.

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2 The Second Circuit's decisions have generated massive confusion at the bar, typified in a front page article in a popular legal periodical—The National Law Journal, August 13, 1984, page 1, col. 3: "A RICO CRISIS—2d Circuit Rulings Sharply Curb Civil Actions; Lawyers See Confusion Until High Court Acts."

I.

THE SECOND CIRCUIT'S STANDING REQUIREMENTS FIND NO SUPPORT IN THE LANGUAGE OR HISTORY OF THE ACT

The majority below acknowledged that Bankers was injured by respondents' conduct (App. 13). Nevertheless, the majority concluded that Bankers was not injured, within the meaning of section 1964(c), "by reason of a violation of section 1962".

The principal RICO violation alleged by Bankers is defined in section 1962(c):

> "*to conduct or participate*, directly or indirectly, in the *conduct* of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." (emphasis added)

The civil remedy of section 1964(c) provides:

> "Any person injured . . . by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate district court and shall recover threefold the damages he sustains. . . ."

Thus, if the unlawful *conduct* of the enterprise caused injury, the victim has a remedy under section 1964(c). *See, Haroco, supra*, slip op. at 28.

The majority below, however, adopted a requirement of "distinct RICO injury" which eviscerates the statute. The court held that it was not sufficient that the injury was caused by the conduct of the enterprise in an unlawful manner. Rather, the court held, only injuries somehow caused exclusively by the "pattern of racketeering activity",[3] as distinct from its constituent acts of racketeering activity, are covered by RICO. The majority went on to impose an absolute bar to suit under

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3 The "pattern of racketeering activity" is defined merely as "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5).

RICO when a plaintiff's injury is caused by acts of racketeering activity:

> "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury." (emphasis in original) (App. 16)

The majority, we submit, ignored the statute. RICO is violated by the *conduct* of the enterprise through a pattern of racketeering activity, not by the pattern itself. The majority mistakenly elevated the "pattern", merely one element of a RICO violation, to the status of the violation itself by holding that only injuries caused by the pattern are covered by RICO. In effect, the majority changed the language of section 1964(c), "[a]ny person injured . . . by reason of a violation of section 1962 may sue . . .," into

> "[a]ny person injured . . . by reason of a *pattern of racketeering activity, no part of whose injury is directly caused by a racketeering activity,* may sue. . . ."

Moreover, even under the majority's view that the RICO violation is the pattern of racketeering activity, the majority still erred. The majority required that the acts of racketeering activity themselves not be a direct cause of the victim's injury, apparently assuming that an injury caused by the "pattern" is separable from injuries caused by acts of racketeering activity *and* that the two varieties of injury are mutually exclusive. Thus, even if an injury is caused (under ordinary theories of causation) by the pattern of predicate acts it cannot be redressed under RICO if the injury is also deemed caused by the predicate acts themselves.

The majority was wrong. There is no real difference between injuries caused by a pattern of racketeering activities and injuries caused by the racketeering activities themselves, and the two "classes" of injuries are certainly not mutually exclu-

sive. As stated in *Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120 (1982):

> "Courts that differentiate between injury from the operation of an enterprise through a pattern of predicate offenses and injury from the predicate offenses themselves create an artificial distinction: the victim of either is the victim of both."

That the majority's distinction between the two kinds of injury is artificial is apparent from its attempt to illustrate the kind of injury to which, it says, RICO's civil remedy is limited:

> "For example, a plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of the fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts." (App. 16-17)

The majority would find the arsonists free from RICO civil liability for the buildings they intentionally destroyed; they would be liable only for the uninsured damage caused innocently, *e.g.*, by a bolt of lightning. Thus, if arsonists burned down six buildings, each valued at a million dollars, neither the landowner nor his insurance company (his subrogee) could sue the arsonists under RICO for the six million dollar loss. But if a now-uninsured seventh building (worth ten thousand dollars) were destroyed by lightning, the landowner could sue the arsonists under RICO and recover up to thirty thousand dollars. Such a result hardly seems consistent with Congress' intention of taking the profit out of crime.

The majority's second illustration is also revealing: a civil RICO action could be brought by a businessman against people who committed felonies against his customers, causing them to stop dealing with his business, but only if the business-

man were "injured" by having to obtain a loan or take in a partner (App. 17). Apart from other criticisms which may be addressed to this illustration, one stands out: if the defendants had succeeded in destroying the business *entirely*, so that the victim could not obtain a loan or a new partner, the defendants' criminal conduct would not subject them to *any* liability under RICO.

The dissent below also observed that these illustrations demonstrated the shortcomings of the majority's analysis (App. 28-29). For example, a victim's right to sue should not be dependent on fortuitous events or his efforts to help himself (App. 29n.1). The dissent also noted that, by limiting standing to "those whose injuries are caused indirectly":

> "the injuries directly caused by the admittedly 'felonious' acts of a RICO defendant (even a member of La Cosa Nostra) would *not* be subject to the civil sanctions Congress specifically enumerated . . . . Stated another way, even a convicted Mafia defendant could escape civil liability for the harm done his intended victim under the majority's reasoning." (emphasis in original) (App. 28-29).

Undoubtedly, RICO's civil damage remedy should cover injuries indirectly caused by the defendants' conduct of their enterprise, as described by the Second Circuit, such as uninsured fire damage or interest paid on a loan. But Congress could not have intended that RICO's civil remedy permit recovery *only* for such indirect or accidental fragments of a victim's injuries, while not permitting recovery for serious damage directly caused by the criminal operation of the enterprise. As the Seventh Circuit said in *Haroco, supra* (slip op. at 27), rejecting the majority opinion below:

> "[B]y restricting civil RICO to such indirect injuries as those discussed in the opinion's examples, and by denying RICO claims for the injuries resulting from the extended pattern of racketeering activity in that case itself, *Bankers Trust* reduces RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts."

The language of the statute does not support the majority opinion below. As this Court has held, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States v. Turkette*, 452 U.S. 576, 580 (1981).

Section 1964(c) imposes no requirement of a "special" kind of injury, much less one which is "indirectly" caused by or "distinct" from the acts of racketeering activity. *See Furman v. Cirrito* (App. 115). Not only does the statute omit any such limitation but Congress directed that the provisions of RICO be "liberally construed to effectuate its remedial purposes" and, as noted in another context, Congress intentionally employed broad terms in order to implement RICO's intended breadth. *Russello v. United States*, *supra*, 104 S.Ct. at 300. Thus, the plain language of RICO permits the victim to sue for injuries resulting from the conduct of an enterprise through a pattern of racketeering, whether or not those injuries are "indirect" or "distinct" from the injury caused by the acts of racketeering activity.

The legislative history contains nothing that suggests a contrary interpretation of the statute. RICO's legislative history is long and complex. However, certain matters are indisputable.

First, Congress intended to create new tools and weapons to deal with the problems of organized criminal activity. *See*, Statement of Findings, 84 Stat. 922-23; S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). Congress was well aware that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." *United States v. Turkette*, *supra*, 452 U.S. at 587 (reviewing the legislative history).

Second, while Congress' principal target was "organized crime," it knew that RICO would extend to more prosaic criminal activities. Bankruptcy fraud was included as a predicate racketeering act in the earliest versions of the statute and Congress later extended the list of predicate acts to include mail fraud, wire fraud and securities fraud. *See*, S. 1623, 91st

Cong., 1st Sess. (a predecessor of RICO), 115 Cong. Rec. 6995-96 (1969); S. Rep. No. 617, *supra*. *See also*, 116 Cong. Rec. 18,913-14 (1970) (Remarks of Senator McClellan) (pointing to the difficulty of drafting a bill to reach all the activities of organized crime and yet not reach offenses commonly committed by persons outside organized crime).

Third, Congress intended that RICO be used to take the profit out of crime. *United States v. Turkette*, *supra*, 452 U.S. at 591-92 and authorities cited therein; *Russello v. United States*, *supra*, 104 S.Ct. at 302-03 (profits, income and economic power of criminals are a principal target of RICO).

Fourth, RICO's private civil remedy (section 1964(c)) was not intended to be limited by complicated or obscure requirements of "standing" or "proximate cause". Versions of the private civil remedy were proposed at least as early as 1967, when Senator Hruska introduced S. 2048 and S. 2049, 90th Cong., 1st Sess. (1970), which would have amended the Sherman Act to reach organized criminal activity. *See*, 113 Cong. Rec. 17,999 (1967) (Statement of Sen. Hruska). However, the Antitrust Section of the American Bar Association argued against placing the civil remedies in the Sherman Act, arguing that the use of the antitrust laws:

> "could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with the body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.' " 115 Cong. Rec. 6995 (1969).

Senator McClellan's proposed S. 30, which did not include a private civil remedy, passed the Senate in January 1970, and went to the House for consideration. The American Bar Association recommended amendments including a private treble damage action. Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 538, 543-44 (1970); 116 Cong. Rec.

25,191 (1970). This amendment was adopted by the House Judiciary Committee, and recommended to the House by Congressman Poff. 116 Cong. Rec. 35,295.

House Judiciary Chairman Celler, speaking in support of the bill, specifically noted the private civil remedy provision, 116 Cong. Rec. 35,196 (1970), and the bill overwhelmingly passed. 116 Cong. Rec. 35,344 (1970). As the ABA urged, RICO's private civil remedy was not made part of the antitrust laws. The amended bill returned to the Senate, which accepted the House amendments, including section 1964(c). 116 Cong. Rec. 36,296 (1970).[4] The President, who had earlier urged the inclusion of a private civil remedy, signed the bill on October 15, 1970. 116 Cong. Rec. 37,264 (1970).

In summary, Congress passed RICO in an effort to purge society of organized criminal activities infecting the nation and its commerce. Because the disease was long-standing and deeply entrenched, the treatment included radical new remedies intended to take the profit out of crime, including treble damage suits by persons victimized by those criminal activities. Clearly, nothing in the language or legislative history of RICO supports the proposition that only victims who had suffered some "distinct" or "indirect" injury could sue. *See also*, G. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 280 (1982).

In light of the above, Bankers submits that the decision of the majority below rests on something other than the language and legislative history of RICO. Rather, when viewed together with the companion decision in *Sedima*, the majority's decision is clearly based either upon an unwillingness to believe that Congress knew the import of its words or upon a concern for a presumed "proliferation" of RICO actions.

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4 Several months earlier, Senator McClellan had apprised the Senate of the ABA's proposed civil damage remedy, and had endorsed it. 116 Cong. Rec. 25,191 (1970).

These concerns are not valid reasons to disregard the plain language of the statute. As the Seventh Circuit concluded in *Schacht*:

> "the legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime." 711 F.2d at 1361.

See also, Turkette, supra, 452 U.S. at 587.

The result which would be achieved here by applying the plain language of the statute is not unreasonable. It is hardly repugnant to the policy of an anti-racketeering statute to permit a suit by Bankers, the victim of "a sinister scheme to defraud" (App. 46). *See, Haroco, supra*, slip op. at 14 n.8. Bankers should be allowed to sue for the damages caused by respondents' conducting their enterprise through a pattern of racketeering activities spanning eight years and two states.

II.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THOSE OF OTHER CIRCUITS

The majority below did not even cite the court of appeals decisions from other circuits construing RICO's civil remedy. No other court of appeals has adopted or applied the majority's theory of a strictly limited "distinct RICO injury." To the contrary, all the circuits that have considered civil RICO claims have interpreted or applied section 1964(c) broadly, permitting claims by plaintiffs whose injury from the violation of RICO has also been caused by one or more of the underlying predicate acts. The Seventh Circuit has expressly repudiated the decision below. *Haroco, supra*, slip op. at 18, 27. In addition, numerous district courts have also rejected the requirement of a "special" or "distinct" RICO injury. The conflict created by the Second Circuit can only be resolved by this Court.

The federal courts have split into at least four camps on the issue of what injury is compensable under RICO.

The other Circuits that have considered this issue clearly would uphold Bankers' right to sue. They have not imposed any arbitrary limitation on the nature of the required injury and many have expressly rejected the theory that RICO's civil remedy is limited to "indirect" injury. In *Haroco, supra*, slip op. at 27-28, the Seventh Circuit said "[t]he injuries for which RICO recovery was denied in *Bankers Trust* are not distinguishable in any meaningful way from those alleged in [earlier Seventh, Eighth and Fifth Circuit decisions upholding RICO claims]," citing: *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); *Bunker Ramo v. United Business Forms, Inc.*, 713 F.2d 1272, 1287-88 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1344, 1358 (7th Cir.), *cert. denied sub nom. Arthur Andersen and Co. v. Schacht*, 104 S.Ct. 508 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir.), *aff'd*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983).[5]

Some courts have required a "competitive" or antitrust-type injury, a requirement expressly rejected by the Second Circuit majority below (App. 14 n.6). *See, e.g.*, the district court opinion herein (App. 44).

A few courts, including the majority below, have opted for some variant of "racketeering enterprise injury". *See, e.g.*, the

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5 In *Haroco, supra*, slip op. at 9 n. 6 the Seventh Circuit noted that the Eighth Circuit's position "has been clouded by" *Alexander Grant and Co. v. Tiffany Industries, Inc.*, [1984] Fed. Sec. L. Rep. (CCH) ¶ 91,671 (8th Cir. 1984). There, the Eighth Circuit criticized the concept of "racketeering enterprise injury" as "a slippery concept whose definition has eluded even those courts professing to recognize it"; and expressly rejected the holding of *Sedima*. The *Grant* court nevertheless characterized its decision as "consistent with" *Bankers Trust v. Rhoades* (the majority opinion below), but, at the same time, stated that the *Bankers Trust* injury test is "far narrower" than its own and cited, with apparent approval, the unanimous dissenting opinion of the Second Circuit panel in *Furman v. Cirrito*.

cases cited in *In re Cantanella*, 583 F. Supp. 1388, 1434 (E.D. Pa. 1984).

Finally, some courts have taken positions that do not fit into any of the foregoing categories. *See, e.g., Sedima* (requiring a "mobster" type injury); *Johnsen v. Rogers*, 551 F. Supp. 281, 285-86 (C.D. Calif. 1982) (requiring a "commercial" injury not otherwise compensable by other remedies); *Willamette Savings & Loan v. Blake & Neal Finance Co.*, 577 F. Supp. 1415, 1430 (D. Ore. 1984) ("I know it when I see it").

The highly restricted definition of "distinct RICO injury" created by the majority below is contrary to the holdings of the other circuit courts. As noted above, *Haroco, supra*, expressly rejected the holding in the instant case. In *Bunker Ramo Corp. v. United Business Forms, Inc., supra*, plaintiff's injury was its payment of fictitious invoices, an injury directly caused by predicate acts of mail fraud. The Seventh Circuit sustained the RICO claim. In *Sutliff, Inc. v. Donovan Companies, Inc., supra*, the Seventh Circuit sustained a RICO claim by creditors whose injury, the uncollectability of their extensions of credit, was caused by the predicate acts.

Bennett v. Berg, supra, sustained a RICO claim based on defendants' conducting their enterprise (a corporation operating a retirement village) through a pattern of mail fraud, resulting in a diminution of the value of plaintiffs' contractual rights to live in the village. In considering whether this was the kind of injury appropriate for a civil RICO claim, the Eighth Circuit noted that the essence of plaintiffs' RICO claim was "injury flowing from fraud", 685 F.2d at 1058, and rejected the argument that plaintiffs' injuries were "attributable only to individual acts of mail and wire fraud", holding that this was merely another form of argument as to whether there was an "enterprise". *Id.*, at 1059 n.5.

Alcorn County v. U.S. Interstate Supplies, Inc., supra, upheld a RICO claim where the County's injury was money it was fraudulently induced to pay out. In considering whether the injury fell within the scope of civil RICO the Fifth Circuit

noted that "[m]ost courts have read the 'injury' requirement of section 1964(c) broadly," and held that

> "the injury alleged by Alcorn County in this case, including unauthorized purchases at inflated prices, procured by bribery and threats, and payment for goods never received, falls within the scope of a civil RICO action."

731 F.2d at 1169. Thus, the Fifth, Seventh and Eighth Circuits have held that the plaintiffs could sue under RICO even though their injuries flowed directly from some of the underlying acts of racketeering activity and were not "distinct" from those injuries.

District courts in other circuits have also rejected the approach of the Second Circuit. For example, the district courts in the Third Circuit have consistently rejected a "distinct injury" requirement like that of the majority below in this case. *See, In re Cantanella*, 583 F. Supp. 1388, 1434-1437 (E.D. Pa. 1984); *Kirshner v. Cable/Tel Corp.*, 576 F. Supp. 234, 244 (E.D. Pa. 1983); *Seville Industrial Machinery Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983), *rev'd on other grounds*, No. 83-5575 (3d Cir. September 6, 1984) (available Lexis Genfed library) (such a requirement would "lead to the anomalous result of denying standing to direct victims of racketeering activity"; the complaint was sustained by the court of appeals). Many other district courts throughout the country also expressly reject injury requirements of the kind imposed by the majority below. *See, e.g.*, *Morosani v. First National Bank of Atlanta*, 581 F. Supp. 945 (N.D. Ga. 1984); *Grado v. Gross*, [1984] Fed. Sec. L. Rep. (CCH) ¶ 91,660 (D. Mass. 1984); *Slattery v. Costello*, 586 F. Supp. 162 (D.D.C. 1983); *In re Longhorn Securities Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983); *Ralston v. Capper*, 569 F. Supp. 1575 (E.D. Mich. 1983).

The Second Circuit itself is racked by disagreement on the issue presented in this case, as shown by the dissent below, the unanimous opinion in *Furman v. Cirrito* and by the divergence between the majority opinions in *Sedima* and the instant case.

Indeed, a RICO claim that might pass muster under the majority opinion in *Sedima* would not survive under the majority opinion in the instant case. *See, Sedima*, (App. 73-74), and Judge Cardamone's dissent below (App. 29); *see also, Haroco, supra*, slip op. at 26.

It is evident that a definitive ruling is needed to unify the law and to give the RICO civil remedy its intended scope as a weapon against crime.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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October 23, 1984

84-657

No. 84-____

OCT 24 1984

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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140 pp

TABLE OF CONTENTS

	PAGE
Order and Judgment of the Court of Appeals for the Second Circuit	1a
Opinion of the Court of Appeals for the Second Circuit	3a
Opinion and Order of the District Court	33a
Opinion of the Second Circuit in *Sedima v. Imrex*	48a
Opinion of the Second Circuit in *Furman v. Cirrito*	107a
Relevant Statutory Provisions	128a
List of Parent, Subsidiaries and Affiliates of Petitioner Bankers Trust Company	135a

Order and Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of July one thousand nine hundred and eighty-four.

Present:

Hon. THOMAS J. MESKILL
Hon. AMALYA L. KEARSE
Hon. RICHARD J. CARDAMONE

Circuit Judges,

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING COMPANY, INC., CAPITAL AID CORPORATION, AND "JOHN DOES NOS. 1-50,"

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed without costs to either party, in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

By /s/ EDWARD J. GUARDARO,
Edward J. Guardaro,
Deputy Clerk

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 450—August Term, 1983

(Argued: December 14, 1983 Decided July 26, 1984)

Docket No. 83-7636

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION, AND "JOHN DOES NOS. 1-50,"

Defendants-Appellees.

Before:

MESKILL, KEARSE, and CARDAMONE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, William C. Conner, *Judge*, dismissing complaint for failure to state a claim under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982), on the ground that the complaint failed to allege the requisite "distinct RICO injury."

Affirmed.

Judge Cardamone dissents in a separate opinion.

DAVID B. EIZENMAN, New York, New York (David Rabinowitz, Ira Schreck, Moses & Singer, New York, New York, on the brief), *for Plaintiff-Appellant*.

JOEL W. STERNMAN, New York, New York (Grace Goodman, Rosenman Colin Freund Lewis & Cohen, New York, New York, on the brief), *for Defendant-Appellee Herman Soifer.*

ARCHIBALD A. PATTERSON, Rhoades and Rhoades, P.C., New York, New York, *for Defendants-Appellees Daniel Rhoades, Milton Braten, Brookfield Industries, Inc., Bennington Court Ltd., Braxton Ltd., Aura by Laurie Ltd., Erwin Commercial Corp., Michael B. Marks, Inc., Timely Textiles, Inc., Todd Equipment Leasing Co., Inc., Capital Aid Corporation, and John Does Nos. 1-50.*

KEARSE, *Circuit Judge*:

Bankers Trust Company ("Bankers") appeals from a judgment of the United States District Court for the Southern District of New York, William C. Conner, *Judge*, dismissing pursuant to Fed. R. Civ. P. 12(c) Bankers's complaint which sought, *inter alia*, treble damages pursuant to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982), for injuries suffered principally as a result of defendants' bankruptcy frauds. The district court, in an opinion reported *sub nom. Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235 (S.D.N.Y. 1983), found that the complaint failed to state a claim under 18 U.S.C. § 1964 ("civil RICO") because the statute provides relief only for "distinct RICO injury," *i.e.*, injury caused by the pattern of racketeering activity rather than by the predicate acts that constitute the pattern. On appeal Bankers challenges the court's interpretation of the statute. As set forth below, we are in substantial agreement with the district court's interpretation, and we affirm the dismissal of the complaint.

I. BACKGROUND

The complaint alleges a scheme by the defendants to defraud Bankers through, *inter alia*, the concealment of assets subject to distribution in bankruptcy and the bribery of a judge. Since the case comes to us on an appeal from entry of judgment on the pleadings pursuant to Rule 12(c), we set forth the facts as alleged in the complaint. Many of the allegations have been thoroughly detailed in the bankruptcy court's opinion in *In re Braten Apparel Corporation*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982), and the district court's opinion affirming the bankruptcy

court's order, *see* 26 B.R. 1009 (S.D.N.Y. 1983), familiarity with which is assumed.

The principal actors in the scheme were Braten Apparel Corp. ("BAC"), a corporation that owed Bankers some $4,000,000; defendant Milton Braten ("Braten"), an officer and principal shareholder of BAC; defendant Daniel Rhoades, an officer, director, and/or shareholder of BAC, and an attorney for BAC and Braten; defendant Herman Soifer, a shareholder of BAC; and Walter Feldesman, an attorney who represented BAC, Soifer, and defendant Brookfield Clothes, Inc. ("Brookfield").[1] Braten, Rhoades, and Soifer were also officers, directors, and/or shareholders of all of the other corporate defendants named in the complaint in the present action.

A. *The Initial Bankruptcy Fraud*

The initial fraud consisted of a complex scheme devised in 1974 by Braten, Feldesman, and Soifer to enable BAC to eliminate, without payment, much of its $4,000,000 indebtedness to Bankers while retaining valuable assets. In August 1974, BAC acquired all of the stock of Brookfield, an entity then having a net worth of more than $3 million. Prior to the acquisition, Feldesman, Braten, and Soifer agreed that Soifer would be given the apparent ownership of the Brookfield stock but would hold the stock in a secret trust for BAC while BAC filed a bankruptcy petition and gained a discharge of its indebtedness under Chapter XI of the then-applicable Bankruptcy Act of 1898 ("Bankruptcy Act"), 11 U.S.C. §§ 1-1103 (1976). To implement the plan, Braten and Soifer executed a sham "Shareholder's Agreement,"

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1 Feldesman was originally named as a defendant, but by stipulation the complaint against him was dismissed.

drafted by Feldesman, which provided that if BAC or Braten did not furnish a $250,000 loan to Brookfield by a specified date, BAC's stock in Brookfield would automatically be transferred to Soifer. At the time this agreement was entered into, Braten, Feldesman, and Soifer knew that the funding condition would not be met; they intended that Soifer would hold the stock of Brookfield, safe from the claims of BAC's creditors, only during BAC's bankruptcy proceedings. Soifer was to return the stock to BAC following its discharge in bankruptcy.

On September 5, 1974, BAC's stock in Brookfield was transferred to Soifer; on that day BAC filed its petition in bankruptcy. BAC did not list the Brookfield stock as an asset. Braten, Rhoades, Soifer, and Feldesman thereafter affirmatively misrepresented to Bankers and the bankruptcy court that BAC had, through failure to meet the Shareholder's Agreement's funding condition, lost its ownership of the stock. Through this and related misrepresentations, Feldesman and the individual defendants induced BAC's creditors, including Bankers, to approve a plan of arrangement under which Bankers would receive payment of only 17-1/2% of its claims and BAC would be relieved of more than $4.3 million of its debts. Had BAC's stock in Brookfield been included in BAC's plan of arrangement, BAC would have had assets sufficient to satisfy Bankers's claims in full.

BAC's plan of arrangement was approved by the court in March 1976. In August 1976, Soifer returned the Brookfield stock to BAC. Soifer, Braten, and Rhoades then revealed to Brookfield's auditors that BAC had in fact owned this stock all along.

In September 1976 Bankers commenced a proceeding in the bankruptcy court under Bankruptcy Act § 386, 11

U.S.C. § 786 (1976),[2] to revoke the confirmation of BAC's plan of arrangement because of the fraudulent concealment of BAC's ownership of the Brookfield stock. Following lengthy proceedings including a trial, the bankruptcy court revoked the confirmation in 1982, *see In re Braten Apparel Corporation*, *supra*, 21 B.R. 239, finding that the individual defendants had devised and carried out a scheme to defraud by making false statements and oaths in BAC's listing of the assets of the estate, and by intentionally concealing property of BAC. The bankruptcy court ordered BAC to "offer a plan which is realistic . . . in light of the fact that the debtor owns a valuable asset—Brookfield." *Id.* at 263. This decision was affirmed by the district court, *see* 26 B.R. 1009, and the district court's decision was affirmed by this Court by summary order entered on September 1, 1983.

B. *The 1982 Bankruptcy Fraud*

In the meantime, however, BAC had entered into a new scheme to protect many of its assets from its creditors. Its principal action, again, was to transfer its stock in Brookfield. In January 1982, defendant Bennington Court Ltd. ("Bennington") borrowed more than $8.9 million from a financing company called KB Business Credit, Inc. ("KBBC"). Bennington then gave these funds to several of the other defendants in this case. When the funds were

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2 Section 386 of the Bankruptcy Act provided that a bankruptcy court could set aside its confirmation of a debtor's plan of arrangement

> [i]f, upon the application of parties in interest filed at any time within six months after an arrangement has been confirmed, it shall be made to appear that fraud was practiced in the procuring of such arrangement and that knowledge of such fraud has come to the petitioners since the confirmation of such arrangement . . . .

11 U.S.C. § 786 (1976).

not repaid, KBBC brought a civil RICO action for treble damages against BAC, Braten, Rhoades, and others. The defendants quickly settled the lawsuit by having BAC convey its stock in Brookfield—for little or no consideration—to defendant Todd Equipment Leasing Co., Inc., which in turn pledged the stock to KBBC. As a result, BAC was able to frustrate Bankers's attempt in bankruptcy court to obtain some benefit from BAC's earlier ownership of the stock of Brookfield.

C. *The Frivolous Lawsuits and the Bribery of a Judge*

The complaint also alleges that during the perpetration of BAC's initial bankruptcy fraud, BAC and the individual defendants instituted several frivolous lawsuits against Bankers in New York state court, alleging that Bankers had breached a commitment to extend additional credit to BAC and seeking millions of dollars in damages. The only purpose of these suits was to hinder Bankers's collection of the debt owed to it by BAC. Each suit was summarily dismissed, but not without Bankers's having to incur substantial legal expenses.

In August 1977, BAC instituted an action against Bankers in South Carolina based on claims similar to those asserted in the New York actions, seeking $195 million in damages. Braten brought another action in South Carolina, asserting claims, allegedly superior to those of Bankers, to funds in an escrow account derived from the sale of machinery in which Bankers had a security interest. Rhoades acted as counsel to a South Carolina law firm representing BAC and Braten in these actions and, according to the complaint, proceeded to bribe the judge before whom they were pending.

In 1978, while the actions were pending before Judge William H. Ballenger, Rhoades used a South Carolina

corporation formed by him to assume a mortgage debt on which Judge Ballenger was personally liable to the extent of $100,000. Rhoades thereafter made payments on the debt as installments came due. Rhoades's actions induced Judge Ballenger to render at least two decisions favorable to Braten and BAC: (1) in Braten's action to collect from the escrow account, he appointed a former partner of the law firm to which Rhoades was counsel as a "special referee" with the power to deny Bankers a jury trial; and (2) in BAC's $195 million damage action, he arbitrarily denied Bankers's motion to dismiss. Judge Ballenger eventually recused himself from the escrow account action after citing a "possible conflict of interest," and his special referee resigned. In the BAC action, the South Carolina Supreme Court reversed Judge Ballenger's denial of Bankers's motion to dismiss as an abuse of discretion. In the meantime, however, Bankers had expended more than $100,000 in defending the South Carolina cases.

D. *The District Court's Opinion*

Bankers's complaint alleged that the defendants constituted or formed a RICO "enterprise" within the meaning of 18 U.S.C. § 1961(4); that their actions were criminal offenses involving, *inter alia*, bankruptcy fraud, perjury, and bribery; that each of the offenses was a "racketeering activity" within the meaning of § 1961(1); that any two such offenses constituted a "pattern of racketeering activity" within the meaning of § 1961(5); that defendants' formation, control, and conduct of the enterprise through their pattern of racketeering activity violated §§ 1962(a), (b), and (c); and that defendants' conspiracy to do such acts violated § 1962(d). Bankers demanded, *inter alia*, treble damages and attorney's fees pursuant to civil

RICO, § 1964(c). Defendants moved for judgment on the pleadings principally on the ground that the complaint was insufficient to state a claim under civil RICO.

In deciding the defendants' motion, the district court stated that the facts alleged by Bankers "strongly suggest a sinister scheme to defraud the bank and other creditors of the monies they lent in good faith to BAC," 566 F. Supp. at 1242, and that, "based solely upon the language of the statute, one could hardly contend that [Bankers] has not adequately alleged a violation of § 1962," the criminal provisions of RICO, *id.* at 1239. The court concluded, however, that the complaint did not state a valid claim for relief under civil RICO. Construing § 1964(c)'s requirement that a civil plaintiff be injured "by reason of a violation of section 1962," the court reasoned that to satisfy this requirement a civil plaintiff must "allege that he has suffered a distinct RICO injury as opposed merely to a direct injury from the underlying predicate acts." 566 F. Supp. at 1240. Although finding it unnecessary to define what such "distinct RICO injury" would entail, the court opined that the provisions of civil RICO should be limited to the redress of "competitive injury" or "an injury to competition," *id.* at 1241. Because Bankers's complaint alleged only injury that was "a direct consequence of the predicate acts," and not a "distinct RICO injury," the district court dismissed the complaint. *Id.* at 1242. This appeal followed.

II. DISCUSSION

RICO's provision for a private treble damage right of action reads as follows:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this

> chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). Section 1962 makes it unlawful, *inter alia*, (1) to invest income derived from a pattern of racketeering activity in any enterprise that is engaged in interstate commerce, § 1962(a); (2) to acquire or maintain control of such an enterprise through a pattern of racketeering activity, § 1962(b); (3) to participate in the conduct of such an enterprise's affairs through a pattern of racketeering activity, § 1962(c); or (4) to conspire to do any of the above, § 1962(d).[3]

"[E]nterprise" is defined to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "[R]acketeering activity" is defined as an act or threat involving any of a number of specified felonies chargeable under state law or indictable under specified federal statutes (collectively "predicate acts"); bankruptcy fraud and bribery are included. § 1961(1). A "pattern of racketeering activity" is defined to "require[] at least two acts of racketeering activity" within a ten-year period. § 1961(5).

The focus of the present appeal is the meaning of § 1964(c)'s phrase "person injured in his business or property by reason of a violation of section 1962." The phrase comprises three elements: injury to the plaintiff, causation of that injury, and the conduct that caused the

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[3] Section 1962 also prohibits actions to invest in, control, or participate in such an enterprise through the "collection of an unlawful debt." Such collection activities are not at issue here and are not intended to be dealt with in our discussion of other aspects of § 1962.

injury. The first two elements present no problem in the instant case.

The requirement that the injury be to the plaintiff's business or property means that the plaintiff must show a proprietary type of damage. For example, a person physically injured in a fire whose origin was arson is not given a right to recover for his personal injuries; damage to his business or his building is the type of injury for which § 1964(c) permits suit. Bankers has alleged that it has been deprived of various sums of money by the defendants' activities. There is no question that this constituted "injur[y] in [its] business or property," and that Bankers has thus adequately pleaded an injury of the type contemplated by § 1964(c).

The requirement that the injury be "by reason of" a violation of § 1962 means that there must be a causal connection between the prohibited conduct and the plaintiff's proprietary injury. Thus, it is insufficient for a plaintiff to prove simply a violation by the defendants and a proprietary injury; it must prove that the defendants' violation caused the injury. There is no question in this case that Bankers has adequately alleged that its monetary losses occurred "by reason of" conduct of the defendants. The difficulty lies in the nature of the conduct that caused Bankers's injury.

Section 1964(c) does not provide a private right of recovery unless the conduct that caused the injury was "a violation of section 1962." We must therefore ask what conduct violates that section. Although, as detailed above, § 1962 has a number of facets, it is clear that it does not itself prohibit the predicate acts that constitute racketeering activity. Commission of two or more predicate acts is but an element of a § 1962 violation; those acts do not themselves constitute the § 1962 violation.

Indeed, § 1962 does not even prohibit a pattern of racketeering activity, without more. Rather, there is a violation of § 1962 only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise.[4] It is this confluence that constitutes the violation and, therefore, the confluence that must cause the proprietary injury.

The import of this analysis is that if a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by its use of a pattern of racketeering activity in connection with a RICO enterprise, the injury cannot be said to have been caused by "a violation of section 1962." *See Sedima, S.P.R.L. v. Imrex Co.*, No. 83-7965, slip. op. at 5535, 5557-58 (2d Cir. July 25, 1984).[5] Accordingly, we agree with the conclusion of the district court that a civil RICO complaint must allege "a distinct RICO injury," by which we mean that it must allege a proprietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation.[6]

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4 *See* note 3, *supra*.

5 As an alternative ground, the *Sedima* panel also ruled that a plaintiff may not prevail in a civil RICO suit without establishing criminal convictions of the defendant on the underlying predicate acts or a conviction under RICO itself. We need not reach this issue in light of our conclusion that the conduct that caused Bankers's injury did not constitute a violation of § 1962.

6 We do not agree with the view that, because the structure of § 1964(c) was patterned after § 4 of the Clayton Act, 15 U.S.C. § 15 (1982), which grants a private right of action under the antitrust laws, *see e.g., Sedima S.P.R.L. v. Imrex Co., supra*, slip op. at 5558; *In re Action Industries Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1040, 1042 (1980), a civil RICO plaintiff is required to

We regard this as the plain meaning of § 1964(c), and we see no basis for inferring that Congress did not intend what it plainly said. The legislative history of civil RICO has been exhaustively explored by this Court recently in *Sedima, S.P.R.L. v. Imrex Co., supra*, slip op. at 5545-53, and we need not detail it here. Suffice it to say that the terms of § 1964(c) were not discussed at all in the Senate, whose final RICO bill did not contain a provision for a private right of action, and that the discussions in the House of Representatives centered almost entirely on the provision of civil remedies to be enforced by the government rather than by private parties. *See id.* at 5550 and n.24. As *Sedima* notes, the provision for a private

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to show a "competitive injury" or injury to competition. *See Bankers Trust Co. v. Feldesman, supra*, 566 F. Supp. at 1241; *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980). Although in enacting RICO Congress made an express finding that organized crime "interfere[s] with free enterprise," Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (Statement of Findings and Purpose), and the major purpose of Congress's enactment of RICO was to address the infiltration of organized crime into legitimate business and to protect free and fair enterprise, the objectives of RICO go beyond the objectives of the antitrust laws. Congress was concerned as well with the effects of organized crime upon democratic processes, innocent investors, domestic security, and the general welfare of the United States and its citizens. *See id.*; S. Rep. No. 617, 91st Cong., 1st Sess. 81-82 (1969). The language used in § 1964(c), "injured in his business or property," is unaccompanied by any other restrictions as to type of injury, and hence is broad enough to encompass private proprietary injury that has no impact on the plaintiff's ability to compete or on competition as such. We see no basis in the statute for importing the antitrust concepts. Indeed, as set forth in *Sedima S.P.R.L. v. Imrex Co., supra*, slip op. at 5559-60, the legislative history of civil RICO suggests that Congress did not intend § 1964(c) to be fettered by antitrust concepts. *See, e.g.*, S. Rep. No. 617, 91st Cong., 1st Sess. 81-82 (1969); 115 Cong. Rec. 9567 (1969) (statement of Senator McClellan); *id.* at 6992-93 (statement of Senator Hruska); Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 149 (1970) (statement of the Antitrust Section of the American Bar Association); *id.* at 157 (statement of Attorney General Mitchell).

treble damage action was added by a subcommittee of the House Judiciary Committee; when the Judiciary Committee reported the amended bill to the House, it did not mention the addition of this right of action. *Id.* at 5547-49. In the House discussion of the bill, there was but one brief remark explaining the substance of the proposed amendment, as Congressman Poff, a member of Judiciary Committee, noted that

> at the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.

116 Cong. Rec. 35,295 (1970). The remark fully supports our application of § 1964(c) according to its terms, since Congressman Poff spoke of recovery by persons injured by reason of "a violation of the title."

Bankers argues that it is conceptually impossible to make any distinction between injury flowing from the predicate acts and injury flowing from a pattern of racketeering activity, because a plaintiff injured by the predicate acts is *ipso facto* injured by the pattern. We disagree. If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury. Further, we can envision a number of circumstances in which injury could be attributable to a pattern but not to the individual predicate acts. For example, a plaintiff who is victimized by a defendant enterprise's multiple acts of arson may

thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. Or, a plaintiff might be forced to incur an unwanted debt or to take on an unwanted business partner because an enterprise has placed his business in jeopardy by using felonious means to cause a number of his customers to withhold their custom. In each instance, the plaintiff would have suffered an injury to his business or property by reason of the defendants' use of a RICO enterprise and a pattern of racketeering acts; the individual racketeering acts, however, could not be said to have caused the same injury.

In the present case, we agree with the district court that Bankers's complaint did not allege a distinct RICO injury, *i.e.*, an injury caused by a violation of § 1962, but only injuries caused by the individual predicate acts—or indeed, acts that are not specified as predicate acts under § 1961(1). Thus, Bankers's loss of 83% of the debt owed it by BAC was caused by the defendants' bankruptcy fraud. That injury occurred in 1976 when BAC's plan of arrangement was approved and BAC was discharged in bankruptcy.[7] The fact that later actions by the defendants may have prevented Bankers from remedying the injury

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[7] It would of course be possible to fragment virtually any fraudulent scheme and characterize phases of the scheme as violations of various laws (*e.g.*, conspiracy to defraud, fraudulent representations, fraudulent use of the mails, etc.). The matter of whether given conduct should be considered one or more than one "predicate act" is a matter best left, in the first instance, to the discretion of the district judge. *See, e.g.*, Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 Ga. L. Rev. 43, 66 (1983).

caused it in 1976 does not mean that Bankers was injured by the "pattern" of the bankruptcy fraud and the later acts. Similarly, Bankers's forced expenditures of legal fees in connection with frivolous and corruptly conducted lawsuits occurred as a result of the defendants' distinct conduct in pursuing those lawsuits; Bankers's expenses would have been incurred regardless of any other predicate acts performed by the defendants.

Since we cannot interpret Bankers's complaint as alleging injury caused by the defendants' violation of § 1962, we conclude that the district court properly dismissed the complaint.

CONCLUSION

The judgment of the district court is affirmed. No costs.

CARDAMONE, *Circuit Judge*, dissenting:

In 1970 Congress enacted the Organized Crime Control Act. Title IX of that Act, entitled Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§ 1961-1968 (1982), has stirred a storm of judicial controversy. The question before us on this appeal is whether its provisions mean what they say. Because in my view the majority holds that RICO means something other than what it says, I respectfully dissent. Reflection on RICO's plain language, its legislative history and policy considerations convinces me that the majority has not accorded to

civil RICO the broad sweep Congress intended it to have. Instead, the panel has succumbed to the temptation to put in place its own view of when this statute should be applied. But in so doing, it not only has pulled the teeth from the statute and reduced its effectiveness nearly to zero, but it has also trespassed in an area of law-making exclusively reserved to Congress. If civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will.

The majority opinion adequately details the facts alleged in the complaint. Bankers brings this RICO action based on the following predicate acts: fraudulent conveyance of the Brookfield Clothes stock to defendant Soifer in 1974 (bankruptcy fraud); false testimony in court in 1974 and 1976 regarding Braten Apparel's assets, *i.e.*, concealment of Brookfield as an asset (bankruptcy fraud); fraudulent concealment of Braten Apparel's property from 1974 to present (bankruptcy fraud); bribery of a South Carolina state court judge by Rhoades (state law felony); Braten Apparel's transfer of Brookfield stock to Todd and Todd's pledge of it to K.B. Business Credit to relieve the individual defendants of potential personal liability (bankruptcy fraud).

I *LANGUAGE OF THE STATUTE*

What did Congress have in mind when it enacted civil RICO? To determine the scope of Congress' purpose in enacting a statute the first place to look, of course, is its language. It is a principle of statutory construction that "absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language," *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980). It is there that the Supreme Court began its

analysis of criminal RICO, *United States v. Turkette*, 452 U.S. 576, 580 (1981), and that is where our analysis of civil RICO should begin. *North Dakota v. United States*, 103 S. Ct. 1095, 1102-03 (1983); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

Bankers Trust alleges that the individual and corporate defendants conducted an enterprise through a pattern of racketeering activity in violation of § 1962(c). That section provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The word "enterprise" used in 1962(c) is defined in § 1961(5) as including "any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity." The phrase "racketeering activity," which is also part of § 1962(c), is defined in § 1961(1) as any one or more of some 24 acts indictable under state and federal law. These predicate acts include bankruptcy fraud and bribery "chargeable under State law and punishable by imprisonment for more than one year," *i.e.*, a state law felony. 18 U.S.C. § 1961(1)(A) & (D). Plainly, the statutory definitions for "enterprise" and the predicate offenses that are considered "racketeering activity" are met in this case. It is necessary next to examine what constitutes a "pattern of racketeering activity." Section 1961(5) provides that such a pattern consists simply of at least

two of the included predicate acts of racketeering occurring within ten years of one another. Finally, the statutory language for the relief Bankers seeks must be examined. The provision for treble damages is set forth in § 1964(c) which authorizes "(a)ny person" injured by a violation of § 1962 to sue and "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." No limitation in the scope of this broadly worded section appears, and the words employed are not reasonably susceptible of a restrictive limitation.

In short, Bankers Trust has alleged that the individual defendants, Rhoades, Braten and Soifer, and the corporate defendants controlled by them, violated § 1962(c) by acting together as an enterprise to commit four acts of bankruptcy fraud and one act of bribery which is a state law felony, and that these acts occurred during the years 1974, 1976 and 1982—the date of the last act being within ten years of the next most recent one. It has sued as a corporate person and demands treble damages and a reasonable attorney's fee. Examining plaintiff's complaint in light of the statutory language can lead to no other conclusion than that it alleges a civil cause of action under § 1964 of RICO. Such should be sufficient to withstand a Fed. R. Civ. P. 12(c) motion to dismiss on the pleadings.

II *LEGISLATIVE HISTORY*

Since the statutory language is conclusive absent clear evidence of a contrary legislative intent, *see Iannelli v. United States*, 420 U.S. 770, 786-89 (1975), an analysis of RICO's legislative history is appropriate.

A. *National Crime Problem*

Organized crime as a national problem is not new. Prohibition gave Mafia groups led by people like the notorious Al Capone in the 1920s an opportunity to wield power in the underworld and make money through the sale of bootleg liquor. With prohibition's repeal in 1933, the emphasis shifted to other illegal rackets and to the "laundering" of "dirty" money gained from racketeering activities by investing it in legitimate businesses. The Kefauver Committee's Hearings in the early 1950s, *Special Committee to Investigate Organized Crime in Interstate Commerce*, S. Rep. No. 307, 82d Cong., 1st Sess. 170 (1951), began to reveal the extent of the problem of organized crime to our national weal, and the November 14, 1957 meeting of Mafia chieftains in Appalachin spotlighted it for the public. All of this is familar history, and it was well known to Congress in 1970 as it was recited in one form or another in the hearings prior to RICO's enactment. *See generally Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on S. 30 and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. (1970) (House Hearings); *Hearings Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. 61-62 (1969) (Senate Hearings); S. Rep. No. 617, 91st Cong. 1st Sess. 77-83 (1969) (Senate Report).

B. *Congress Reacts to the Problem*

The first legislative attempt to deal with the problem was Senator Hruska's introduction in 1967 of S.2048 and S.2049, accompanied by a companion bill in the House of Representatives introduced by Congressman Poff.

S.2048, S.2049, 90th Cong., 1st Sess. (1967). These bills focused on the "laundering" of "dirty" money derived from criminal activity. Neither bill was acted upon, in part because the American Bar Association thought that antitrust concepts, with their focus on maintaining competition, might be maladapted to the bill's purposes. 115 Cong. Rec. 6994-95 (1969). Next, in January 1969 Senator McClellan introduced S.30, the Organized Crime Control Act, 91st Cong., 1st Sess. (1969), followed later that year by Senator Hruska's introduction of S.1623 entitled the "Criminal Activities Profits Act," a re-draft of his two earlier bills, which included a provision for treble damages. 115 Cong. Rec. 6995-96 (1969). Later in 1969 Senators McClellan and Hruska jointly introduced S.1861, a bill styled as "The Corrupt Organizations Act." It had no provision for private equitable relief or treble damages. Criticisms of this bill were leveled by the Department of Justice which thought the scope of predicate acts was too broad and that, were it adopted, it would effectively federalize criminal justice. *See House Hearings* at 329; *Senate Hearings* at 404-07.

From these beginnings Senator McClellan on December 18, 1969 amended his previously introduced S.30 to include S.1861 (the bill that he and Senator Hruska had jointly introduced) as Title IX of the Omnibus Crime Control Act of 1970. Title IX included bankruptcy fraud (which had been part of S.1623) and the amended text of Title IX was expanded to include mail fraud, wire fraud, and securities fraud. *Senate Report* at 21. Although the Senate Judiciary Committee reported favorably on S.30, Senators Hart and Kennedy believed the bill went too far and thought it should be restricted solely to "organized crime" activity. *Senate Report* at 215. Title IX, now entitled "Racketeer Influenced and Corrupt Organiza-

tions," was passed by the Senate nearly unanimously (73 to 1) in January 1970 with Senator Hruska commenting that its principal value "may well be found . . . in its civil provisions." 116 Cong. Rec. 602 (1970). The bill was then sent to the House of Representatives. At the House Hearings the Association of the Bar of the City of New York appeared and argued, as had Senators Hart and Kennedy, that the bill went much too far inasmuch as its reach extended beyond organized crime. *See House Hearings* at 342, 370. Similar views were echoed by the American Civil Liberties Union, *House Hearings* at 490, 504, and Senator Young, 116 Cong. Rec. 852 (1970).

Senator McClellan responded by stating that while the impetus for Congress to act arose from the revelations concerning "organized crime," Congress as a legislative body had a duty to enact "comprehensive solutions" that need not be so limited. Further, he stated that it is impossible to draft a law that would effectively reach the commercial activities of organized crime and yet not reach offenses commonly committed by persons outside organized crime. 116 Cong. Rec. 18,913-14 (1970). Congressman Poff's reply to the criticism that the bill did not contain a definition of organized crime was that had the bill included such a definition it would have been objectionable as "status based" legislation. 116 Cong. Rec. 35,204 (1970). In this connection, Congressman Biaggi later offered an amendment (it was not adopted) that would have explicitly prohibited membership in the Mafia. 116 Cong. Rec. 35,343. *See House Hearings* at 146. While S.30 was pending in the House, the ABA in July 1970 recommended several amendments, including a private right of action to obtain treble damages. *House Hearings* at 147, 149, 543-44. During the debate, House Judiciary Chairman Cellar, speaking in support of the

bill, specifically noted the treble damage provision authorizing suits by private parties. 116 Cong. Rec. 35,196 (1970). The bill passed the House by a lopsided margin. 116 Cong. Rec. 35,344 (1970). With the provision for treble damages and several other minor amendments now included, the bill returned to the Senate, where the motion to accept the House amendments was passed by voice vote. 116 Cong. Rec. at 36,296 (1970). The bill was signed into law by the President on October 15, 1970. 116 Cong. Rec. 37,264 (1970). The President had earlier indicated his support for civil remedies *including treble damages* in his message to Congress on Organized Crime. *See Senate Hearings* at 449-50.

C. *Conclusions from Legislative History*

Professor G. Robert Blakey, who served when these bills were processed as Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures, has summarized Congress' purposes in the passage of S.30: (1) RICO was fully intended to apply beyond organized crime; (2) it was deliberately redrafted so as *not* to be limited by anti-trust concepts like "competitive" or "commercial injury;" (3) immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for treble damages; (4) federalizing criminal justice was something of which Congress was well aware when it extended the predicate offenses to wire, mail and securities fraud; (5) Congress was also well aware that it was creating new federal remedies—civil and criminal—for acts traditionally viewed as common law fraud. G. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 280 (1982).

The legislative history further reveals that Congress had fairly detailed information about what was styled a national criminal syndicate known as La Cosa Nostra, a confederation of 24 families consisting of some 5000 individuals. *Senate Report* at 76-83. But as Senator McClellan noted it is sometimes hard "to tell what is or is not-organized crime." *House Hearings* at 129. And the franchise of organized crime is not one that belongs solely to one ethnic group of Americans, as this case illustrates. "Organized criminals who injure business today do not look like stereotyped criminals. They are executives and technicians. Their forte is manipulation of computer information, tampering with accounting procedures, theft of trade secrets and invasion of confidential company files." *House Hearings* at 689. Congress determined therefore not to attack a group of persons or any single organization, but to proscribe broadly those kinds of activities which are at the root of business crime. Congress passed this statute, called an "omnibus" act, to purge society of commercial organized criminal activities regardless of the group perpetrating them. Because the disease is long standing and deeply entrenched, the treatment employed radical new civil remedies, including treble damages, award of attorneys fees, injunction, forfeiture, divestment of interests and dissolution of corporations. For good measure Congress incorporated in § 904(a) of the statute a command to the judiciary that the statute be liberally construed to effectuate its remedial purposes. Pub. L. No. 91-452, § 904(a), 84 Stat. 941 (1970). Since Senator Hruska had included a treble damage provision in earlier versions of RICO, it is apparent that RICO's sponsors in the Senate were fully familiar with the implications of such a private remedy.

That the foregoing was the aim of the statute's principal sponsors, Senators McClellan and Hruska and Congressman Poff, a majority of the Judiciary Committees of both Houses, its overwhelming supporters in both Houses, and the President is beyond serious question. Such view of Congress' aim is shared by a number of commentators. *See, e.g.*, G. Blakey, *RICO Civil Fraud, supra*; J. Wexler, *Civil RICO Comes of Age: Some Maturation Problems and Proposals for Reform*, 35 Rutgers L. Rev. 285 (1983); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 (1982). The answer to the question as to whether the legislative history evinces a legislative intent contrary to the plain language of the statute then must be a resounding "no."

III *ANALYSIS OF MAJORITY'S HOLDING*

The fallaciousness of the district court's opinion and the majority view is demonstrated by analyzing them in the light of the statute's plain language and legislative history. The majority gives its imprimatur to the district court's view that in an ordinary case of bankruptcy fraud civil RICO was not intended to apply. The complaint was dismissed below because Bankers had not been damaged "by reason of" a RICO violation. A number of other courts have sought to thwart RICO's far-ranging impact by requiring "something more" than injury from the predicate acts, *i.e.* something beyond what the statute and its history require, such as a nexus with organized crime, *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984), prior criminal conviction or indictment, *Sedima S.P.R.L. v. Imrex Co.*,

No. 83-7965, slip op. at 5535 (2d Cir. July 25, 1984), or a competitive injury, *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980).

Interpreting civil RICO as requiring "something more" than injury from the predicate offenses, the majority has thus adopted one variant of the "racketeering enterprise injury" standing requirement. For the most part those cases that have upheld civil RICO claims have noted without extensive discussion that any such requirement was satisfied, *see, e.g., Schacht v. Brown*, 711 F.2d 1343, 1358-59 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983). Similarly, decisions like that of the trial court here which have dismissed RICO claims on this ground have not defined the enterprise injury requirement. *See, e.g., Johnsen v. Rogers*, 551 F. Supp. 281, 284-85 (C.D. Cal. 1982).

Here, the panel furnishes examples of a "racketeering enterprise injury," something earlier cases have failed to do. The first example given is that of an arson victim who subsequently suffers innocent fire damage that goes unreimbursed. The second involves a businessman forced to incur unwanted debts or to take on unwanted partners because an enterprise has feloniously caused his customers to "withhold their custom." These examples, far from clarifying the racketeering injury requirement, underscore the difficulty of defining its contours. In both examples, the only victims entitled to recover under civil RICO would be those whose injuries are caused indirectly. In both instances, the injuries directly caused by the admittedly "felonious" acts of a RICO defendant (even a member of La Cosa Nostra) would *not* be subject to the civil sanctions Congress specifically enumerated. The majority's approach thus nullifies § 1964 even in the case of Mafia defendants, the motivating reason for Congres-

sional action in this area. Stated another way, even a convicted Mafia defendant could escape civil liability for the harm done his intended victim under the majority's reasoning.[1]

Thus, unlike the "racketeering enterprise injury" test that focuses on the "by reason of" language, *cf. Sedima S.P.R.L. v. Imrex Co., supra*, slip op. at 5557, that arguably seems to require a link to organized crime, *see id.*, slip op. at 5590, (Cardamone, J., dissenting), the majority's approach here creates the risk that even Mafia defendants will not be subject to the civil liability that Congress so clearly envisioned. For this reason, and because the requirement is generally undefined, a host of recent decisions have rejected the racketeering enterprise injury requirement. *See, e.g., Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 244 (E.D. Pa. 1983) (racketeering enterprise injury requirement has been "uniformly rejected" as contrary to statutory language and legislative intent); *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) (racketeering enterprise injury requirement "undefined"); *Mauriber v. Shearson/Ameri-*

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[1] Further analysis of the majority's examples demonstrates their shortcomings. The arson victim, for example, would have a valid RICO cause of action only because, fortuitously, he had an insurer who cancelled his policy. Similarly, the businessman could sue under § 1964 only because he was forced to incur a debt to or associate with some third party. Congress did not intend § 1964's availability to turn on the *victim's* specific situation or conduct. Rather, the statute is aimed at a defendant's conduct. Suppose, for example, that a member of the Mafia engages in loansharking activity over a ten year period but never forces his victim into dealing with a third party. Even if this member of organized crime were convicted in federal court under RICO's criminal provisions, *e.g., United States v. Riccobone*, 709 F.2d 214 (3d Cir.), *cert. denied*, 104 S. Ct. 157 (1983), the victim would not have a civil RICO claim under the majority's analysis. In this more likely example, the defendant's conduct not only would have caused the plaintiff's injury but is of the specific type Congress sought to give a remedy for when it enacted civil RICO.

can Express, Inc., 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983) (racketeering injury has no basis in language of statute or legislative history and would exclude from section 1964 even the conduct of a firm infiltrated by organized crime); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983) ("this judicially imposed requirement of a 'racketeering enterprise injury' seems artificial and unwarranted by the language of the RICO statute."); *Kimmel v. Peterson*, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983) (racketeering enterprise injury is indistinguishable from competitive or commercial injury requirement and would allow certain targeted behavior to escape section 1964's reach). *See also Alcorn County, Miss. v. U.S. Interstate Supplies*, 731 F.2d 1160, 1169 (5th Cir. 1984); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 653-54 (7th Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053, 1059 n.5 (8th Cir. 1982), *aff'd in part on rehearing en banc*, 710 F.2d 1361, *cert. denied*, 104 S. Ct. 527 (1983) (implicitly rejecting racketeering enterprise injury requirement).

IV *REASONS FOR DISAGREEMENT WITH MAJORITY*

I fail to see how the complaint lacks any element required by the statute. In my view the complaint sufficiently alleges that Rhodes, Braten and Soifer conducted their crooked corporate "shell game" through a pattern of racketeering activity by way of bankruptcy fraud and state law felonies. It is claimed in the complaint that the RICO enterprise operated by these three and their companies in a continuing pattern of racketeering activity was conducted through conspiracy and fraud, each element of which has contributed to the overall injury—loss to

Bankers of some $4 million plus substantial legal fees. These allegations track the plain language of the statute. Moreover, this is *not* an ordinary "garden variety" bankruptcy fraud since defendants' acts occurred over a nine year period in two different states and involved not only fraud, but frivolous litigation, bribery and corruption of state court judges. Only a semantical—not a practical—reading of Bankers' complaint could conclude otherwise. Thus, Bankers has alleged every element § 1964 requires. *See Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1070 (S.D.N.Y. 1983).

Further, the majority's reading of civil RICO is contrary to its legislative history. According to the legislative history "it is the factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). While proof is required of an enterprise and a pattern, we have held that the proof need not be distinct as to each, "as long as the proof offered is sufficient to satisfy both elements." *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 103 S. Ct. 2124 (1983). Two acts in the same criminal episode may establish a pattern of racketeering. *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). In addition to the pattern there must be the requisite connection with the enterprise. We have already spoken on how close that nexus must be by holding that one conducts the activities of an enterprise through a pattern of racketeering activity when he is able to commit predicate offenses solely by virtue of his position, involvement or control over the enterprises' affairs or where the predicate acts are related to the activities of the enterprise. *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). Here that nexus is shown by both tests since the

individual defendants controlled the corporate entities and the fraud and crimes were clearly part and parcel of the way the enterprise was run. Plainly, these acts are the type of commercial activity that Senator McClellan recognized would be caught in the statute's wide net. 116 Cong. Rec. 18,913-14.

The majority has simply amended RICO by adding this standing requirement that Congress did not include and which it readily could have included had it so desired. Adding restrictions to defeat the broad remedies of civil RICO seems a particularly unjustified exercise of judicial power when the same text is interpreted to require none of these same restrictions in criminal cases. Finally, the majority's restrictive reading was thoroughly aired in the extensive Congressional hearings and later rejected when Congress considered those disagreements and resolved them in the bill it enacted into law. By judicially enacting the view that did not carry the day, the majority involves itself in those political controversies appropriate in a bill's enactment, but that have no place in its judicial interpretation. *See Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 393-95 (1951) (Jackson, J., concurring). As another panel of our Court stated recently in *Aetna Cas. and Sur. Co. v. Liebowitz*, 730 F.2d 905, 909 (2d Cir. 1984): "We are bound by the legislative intent that existed when RICO was passed. Congress is free to change that law if it desires."

For these reasons I dissent and vote to reverse the judgment dismissing Bankers Trust's complaint and remand the case to the district court for trial.

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

—against—

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Defendants.

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CONNER, D. J.:

Perhaps enticed by the lure of a treble damage recovery, private litigants have attempted increasingly to utilize the civil remedies[1] of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, in a variety of factual settings ostensibly within the broadly-worded provisions of the statute but arguably far beyond the original

1 18 U.S.C. § 19864.

contemplation of the framers of the legislation. The instant action presents yet another example of that trend. Plaintiff Bankers Trust Company ("Bankers") seeks to invoke the RICO remedies to recover treble damages plus attorney's fees for injuries suffered substantially as a consequence of defendants' alleged bankruptcy frauds. The case is currently before the Court on the motions of defendant Herman Soifer ("Soifer") and defendants Daniel Rhoades ("Rhoades"), Milton Braten ("Braten"), Brookfield Industries, Inc., ("Brookfield Industries"), Bennington Court, Ltd. ("Bennington Court"), Braxton Ltd. ("Braxton"), Aura by Laurie, Ltd. ("Aura"), Erwin Commercial Corp. ("Erwin"), Michael B. Marks, Inc. ("Marks"), Timely Textiles, Inc. ("Timely Textiles"), Todd Equipment Leasing Co., Inc. ("Todd") and Capital Aid Corporation ("Capital") for judgment on the pleadings dismissing the complaint.[2] Rule 12(c), F.R.Civ.P. All defendants contend that the complaint is insufficient to state a civil claim under RICO, while Soifer further argues that the claims against him are barred by the statute of limitations or, if not, may only be asserted in pending bankruptcy proceedings. For the reasons stated below, the motions to dismiss the complaint are granted.

Facts

For purposes of this motion, plaintiff's version of the events will be accepted as true. See 2A J. Moore, Moore's Federal Practice ¶ 12.15 at 2343 (2d ed. 1983). The genesis of this action lies in a $4,000,000 debt allegedly owed to Bankers by the Braten Apparel Corporation ("BAC"). In August 1974, at a time when it had recently sustained severe financial losses and owed substantial debts to Bankers and others, BAC acquired all the stock of Brookfield Clothes, Inc. ("Brookfield Clothes"), which at that time had a net worth of more than $3,000,000. Complaint ¶ 11. Feldesman, Braten and Soifer

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2 The claims against the one other defendant in this action, Walter Feldesman, were dismissed pursuant to a Stipulation endorsed by this Court on March 4, 1983.

allegedly made a secret agreement to conceal this acquisition for the purpose of obtaining a favorable discharge of BAC's debts by pursuing Chapter XI proceedings in the bankruptcy court. Complaint ¶ 13.

To effectuate this plan, Braten and Soifer executed a sham "Shareholder's Agreement," drafted by Feldesman, which purported to require Braten or BAC to furnish a $250,000 loan to Brookfield Clothes by a specified date or else the Brookfield Clothes stock owned by BAC would be transferred to Soifer. At the time they entered into that agreement, Braten and Soifer knew that the condition would not be met, but instead intended that Soifer would hold the Brookfield Clothes stock in a secret trust during the pendency of BAC's Chapter XI proceedings. Complaint ¶¶ 15-17. On September 5, 1974, BAC filed a petition for relief under Chapter XI of the now repealed 1898 Bankruptcy Act. The petition omitted BAC's ownership of the Brookfield stock, which was transferred to Soifer that same day. Complaint ¶ 18. Through a series of omissions and misrepresentations, conveying the erroneous impression that BAC had no ownership interest in Brookfield Clothes, Feldesman, Soifer, Braten and Rhoades, counsel to Braten and BAC in the Chapter XI proceeding, induced BAC's creditors, including Bankers, to approve an arrangement under which Bankers would receive 17½% of its claims. Complaint ¶¶ 18-21. The approval of that arrangement by the bankruptcy court on March 12, 1976 had the effect of relieving BAC of more than $4,300,000 in debts. Complaint ¶ 22. Had BAC's ownership of Brookfield Clothes been revealed, however, a liquidation of BAC would have provided funds sufficient to satisfy in full the debt owed to Bankers. Complaint ¶ 24.

Beginning in August 1976, the individual defendants began to consummate the secret trust through a complicated sequence of stock transfers. First, Soifer acquired from Braten 50% of the stock of Brookfield Industries, to which a substantial portion of the assets of Brookfield Clothes was conveyed. Feldesman then delivered the stock of Brookfield Clothes to Soifer who in turn delivered the stock to Rhoades on behalf of Braten and BAC. Then, in October 1976, Soifer purchased

45% of the stock of BAC from Braten. As part payment for that purchase, Soifer delivered to Braten a $450,000 note in July 1977. That note was subsequently assigned by Braten to Rhoades. Complaint ¶¶ 25-27.

Upon learning of the alleged fraud, Bankers in September 1976 commenced a proceeding in this Court to revoke the approval of the bankruptcy arrangement. While that revocation action was pending, Rhoades and Braten instituted a series of lawsuits in New York against Bankers in order to hinder and delay Bankers' collection of the debt owed to it. The complaint in each of those actions alleged that Bankers had breached a commitment to extend additional credit to BAC and sought millions of dollars in damages. All of those suits were, however, summarily dismissed. Complaint ¶ 29.

In August 1977, BAC commenced suit in South Carolina against Bankers seeking $195,000,000 in damages on the basis of allegations similar to those previously advanced in the New York lawsuits. BAC was represented in that matter by a South Carolina law firm to which Rhoades was of counsel. In a contemporaneous action, Braten, represented by the same South Carolina law firm, asserted claims superior to Bankers' claims to funds in an escrow account derived from the sale of machinery in which Bankers had a security interest. Both of these cases were presided over by Judge William H. Ballenger. Complaint ¶¶ 30-31.

At the end of 1978, Rhoades, through a South Carolina corporation formed by him, assumed mortgage debt on which Judge Ballenger was personally liable to the extent of $100,000. Because of that undertaking, Judge Ballenger was induced to render decisions in the two South Carolina cases favorable to BAC and Braten, including the appointment of a special referee in the escrow action having business ties to Rhoades and the denial of Bankers' motion to dismiss the damage action. Complaint ¶¶ 32-33. This prejudice to Bankers' rights continued until Judge Ballenger recused himself from the escrow action and until his decision denying Bankers' motion to dismiss the damage action was reversed by the South Carolina Supreme Court as an abuse of discretion.

By that time, however, Bankers had incurred attorney's fees in excess of $100,000. Complaint ¶ 34.

In January 1982, Bennington Court obtained advances of more than $8,900,000 from KB Business Credit Inc. ("KBBC") by means of wire transfers of funds, which were then disbursed to the bank accounts of several of the corporate defendants. When these defendants failed to repay the funds so obtained, KBBC instituted a RICO action in this Court seeking to recover treble the amount of its damages. Complaint ¶¶ 36-38.

On February 1, 1982, trial of Bankers' application to revoke the bankruptcy arrangement was completed. While the parties were awaiting the Court's decision in that matter, BAC, in April 1982, conveyed its stock in Brookfield Clothes to Todd for little or no consideration. Complaint ¶ 39. Thereafter, BAC caused Todd to pledge its Brookfield Clothes stock to KBBC in order to induce KBBC to discontinue its lawsuit and thereby relieve the individual defendants of possible personal liability for the advances which had not been repaid to KBBC. Despite this pledge, Todd was not a defendant in the action brought by KBBC. Complaint ¶ 40. Moreover, in addition to the Brookfield Clothes stock transfer, BAC secreted and conveyed without consideration other of its assets during the pendency of the revocation proceeding as a further impediment to satisfaction of the claims of Bankers and other creditors. Complaint ¶ 41. Finally, on June 25, 1982, the Bankruptcy Court for this District revoked the Chapter XI plan, finding, *inter alia*, that confirmation of the plan had been procured by fraud. See *In re Braten Apparel Corp.*, No. 74-B-1256, slip op. at 51 (Bankr. S.D.N.Y. June 25, 1982) (Babitt, J.), *aff'd.* No. 82 Civ. 5712 (GLG), slip op. (S.D.N.Y. Feb 3, 1983).

Discussion

RICO's civil damage remedy provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964. Section 1962(a) makes it unlawful for any person to invest any income derived from "a pattern of racketeering activity" in the acquisition, establishment or operation of any "enterprise" engaged in interstate commerce.[3] Section 1962(b) prohibits any person from acquiring or maintaining an interest in or control of such an enterprise "through a pattern of racketeering activity,"[4] while section 1962(c) makes it illegal for anyone employed by or associated with the enterprise to participate "in the conduct of [its] affairs through a pattern of racketeering activity."[5] It is also unlawful for any

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3 18 U.S.C. § 1962(a) provides in full that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

4 18 U.S.C. § 1962(b) provides in full that:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

5 18 U.S.C. § 1962(c) provides in full that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

person to conspire to violate any of these provisions. 18 U.S.C. § 1962(d).

A "pattern of racketeering activity" includes any two acts of "racketeering activity" within a ten-year period. See 18 U.S.C. § 1961(6). The predicate acts constituting "racketeering activity" encompass virtually every state law felony as well as many federal crimes, including bribery, mail fraud, securities fraud and bankruptcy fraud.[6]

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6 Section 1961(1) provides:

"Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions, section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property) sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

Bankers argues that its claim falls squarely within RICO's broadly-worded provisions. Indeed, based solely upon the language of the statute, one can hardly contend that plaintiff has not adequately alleged a violation of § 1962, a criminal statute. But the existence of a civil RICO remedy for a particular plaintiff does not necessarily follow directly from proper allegations of a criminal violation by the defendants. Section 1964 requires that one suing for damages be injured "by reason of a violation of Section 1962." Moreover, defendants contend that for a private litigant to have a valid cause of action under § 1964 he must adequately allege that the defendants are members of, or have ties to, organized crime. While I reject the proposition that a defendant's connection with organized crime is an independent and essential element of a claim under § 1964, the complaint in the instant case still fails because Bankers has not been damaged "by reason of" a RICO violation.

A. *Organized Crime Connection*

The legislative history of RICO leaves no doubt that Congress intended the statute to combat the growing influence of organized crime in the United States, with specific focus on organized crime's infiltration of legitimate businesses. See 116 Cong.Rec. 953 (1970) (remarks of Senator Thurmond) ("these provisions are new and unique approaches to combat organized crime"); *id.* at 35295 (remarks of Congressman Poff) ("provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped"); *id.* at 35300 (remarks of Congressman Mayne) ("major focus and principal objective of S.30 is to provide new weapons capable of striking at the heart of this criminal hierarchy and its source of revenue"); *id.* at 36926 (remarks of Senator Dole) ("designed to curtail—and eventually eradicate—the vast expansion of organized crime's economic power"); see also *United States v. Turkette*, 452 U.S. 576, 588-89 (1981). Despite the clear goal of the legislation, RICO's draftsmen expressly rejected the idea of including a definition of organized crime in the bill as a means

to accomplish that purpose. They aptly recognized that the concept of organized crime is not susceptible of the type of precise definition that could serve as a basis for consistent judicial application.[7] Moreover, even if the requisite organized criminal nexus could be adequately defined, the draftsmen were concerned that they would be creating a status offense that could not survive constitutional scrutiny. See 116 Cong. Rec. 35204 (1970) (remarks of Congressman Poff).

These concerns have not been lost on the courts, most of which have refused to hold that a private plaintiff must allege the defendant's connection with organized crime as an independent element of a RICO cause of action for damages. See, *e.g.*, *Schact v. Brown*, [Current] Fed.Sec.L.Rep. ¶ 99,160 at 95,604-07 (7th Cir. April 3, 1983) (citing cases); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982); *Richardson v. Shearson/American Express Co., Inc.*, [Current] Fed.Sec. L.Rep. ¶ 99,145 at 95,525 (S.D.N.Y. Mar 29, 1983); *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391, 396 (S.D.N.Y. 1982); *Harper v. New Japan Securities Int'l. Inc.*, 545 F. Supp. 1002, 1006 n.9 (C.D. Ca. 1982). *But see Minpeco v. Conticommodity Services Inc.*, 81 Civ. 7619(MEL), slip op. at 5 (S.D.N.Y. Mar. 21, 1983); *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D.Ill. 1981). Relying heavily on Judge Pollack's recent decision in *Moss v. Morgan Stanley Inc.*, 553 F. Supp. 1347 (S.D.N.Y. 1983), defendants argue that this Court should reject both these precedents and the legislative history and require Bankers to allege that they have a connection with organized crime.

It is true that in *Moss*, Judge Pollack stated that:

> RICO was thus established as a civil weapon against those engaged in organized crime who have gained an

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7 See 116 Cong.Rec. 35204 (1970) (remarks of Congressman Poff) ("is no organized crime definition . . . in part, because it is probably impossible precisely and definitively to define organized crime"). *But cf.* Moss v. Morgan Stanley, 553 F. Supp. 1347, 1359-60 (S.D.N.Y. 1983) (Pollack, J.).

> unfair competitive or financial advantage through criminal means associated with racketeering. The statutory offenses created by RICO were aimed at the evils of criminal racketeering by organized crime that had spread through the economy.
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> * * *
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> In civil litigation there is every reason why the application of RICO should be restricted sharply to organized crime and the enterprises on which its talons have fastened. Thus, courts in the Southern District and elsewhere have held that RICO claims for damages could be maintained only if there was a tie to organized crime. (citations ommitted).

553 F. Supp. at 1361.

However, that statement was unnecessary to the decision in that case because, as Judge Pollack found, the defendant Morgan Stanley was "not principally charged with any substantive act that could constitute even a single act of racketeering." 553 F. Supp. at 1361-62. Although this Court wholeheartedly concurs in Judge Pollack's views respecting the ultimate objectives of Congress, this Court cannot agree with his views as to the means which Congress provided for accomplishing those ends. In any event, this Court believes it unnecessary in this case to expound a legal principle requiring, as an element of a civil RICO claim, establishment of defendants' connection with an identifiable unit of organized crime.

B. *RICO Injury*

However, this does mean that RICO's private remedy has unlimited reach, but only that, instead of adding to the cause of action another element of dubious propriety and uncertain breadth, the proper way to restrict the private remedy to its intended scope is by applying the limitations Congress has itself built into the statute. See also *Moss, supra*, 553 F. Supp. at 1360. One such restriction is the requirement that a private plaintiff allege that he has suffered a distinct RICO injury as

opposed merely to a direct injury from the underlying predicate acts. The words of § 1964 expressly require that a private plaintiff be injured "by reason of a violation of section 1962" in order to maintain an action for damages. Unless these words have no effect, they can only mean that the plaintiff's injuries must derive from the "pattern of racketeering activity" which violates § 1962 rather than directly from the underlying acts which combine to constitute that pattern.[8]

Although it is not necessary for the Court precisely to define the components of a RICO or "racketeering enterprise" injury, see *Landmark Savings & Loan v. Loeb Rhoades Hornblower & Co.*, 527 F. Supp. 206, 209 (E.D.Mich. 1981), in order to resolve the instant motion, it seems appropriate to limit the extraordinary private remedy of § 1964 to the class of plaintiffs who have suffered a competitive injury by reason of the defendant's racketeering activities. See *North Barrington Development, Inc., v. Fanslow*, 547 F. Supp. 207, 211 (N.D.Ill. 1980); *cf. Harper v. New Japan Securities Int'l, Inc.*, 545 F. Supp. at 1007-08. The legislative history reveals that RICO's civil remedy was modeled after the relief available in the antitrust area. See, *e.g.*, 116 Cong. Rec. 35295 (remarks of Congressman Poff) ("private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality"); *Harper, supra*, 545 F. Supp. at 1004-05. The analogy to the antitrust laws is reinforced by the language of § 1964(c), which is virtually identical to that of § 4 of the Clayton Act, 15 U.S.C. § 15, and gives standing only to one "injured in his business or property." In the statement of findings and purposes which accompanied RICO, Congress expressed its concern that "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and com-

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8 Section 1962 creates its own substantive offenses, violations of which carry harsh criminal penalties that are independent of and go far beyond any punishments for the predicate acts themselves. See United States v. Ivic, 700 F.2d 51, 60 (2d Cir. 1983).

peting organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce." Pub.L. 91-454 at § 1. This suggests an injury to competition, which is clearly lacking in the present case.

It is impossible for this Court to believe that in enacting RICO Congress intended to sweep all ordinary injuries occasioned by the predicate criminal acts within the dragnet of the treble damage remedy provided by § 1964. In almost all cases, a person injured directly by a predicate crime will have a cause of action for damages under either federal or state law. See *Landmark, supra,* 527 F. Supp. at 209. For example, it would seem illogical that a plaintiff suing under the federal securities laws could recover only one-third of the damages recoverable by a person suing under RICO for the identical injury.[9] See *Harper, supra*, 545 F. Supp. at 1007-08. Certainly this Court would not attribute to Congress an intention to make this fundamental change in the nature of private damage remedies absent some clear indication that such a drastic result was envisioned.

There is no evidence, however, that RICO was designed to retool private remedies in this manner. It was simply not intended to provide a plaintiff with a windfall recovery for ordinary injuries which are otherwise compensable. See also *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (C.D.Ca. 1982). In *Moss,* Judge Pollack expressed a similar view, which afforded ample grounds for his dismissal of the civil RICO claim against Morgan Stanley, apart from the failure to allege an organized crime connection:

> In other words, plaintiff's injury to be cognizable under RICO must be caused by a RICO violation and not simply by the commission of a predicate offense, such as mail

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9 To bring himself within the ambit of RICO, a plaintiff must, of course, allege that the defendants have committed at least two of the underlying crimes set forth in § 1961(1). However, in view of the broad range of predicate acts covered by that section, including mail fraud, it is a simple task to allege a pattern of racketeering activity in virtually every securities or bankruptucy fraud case.

> fraud or federal securities fraud. RICO's civil remedy provision permits a recovery to "any person injured in his business or property *by reason of a violation of Section 1962*," 18 U.S.C. Section 1964(c) (emphasis supplied), that is, where the distinctive RICO violation contributed to plaintiff's injury.
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> * * *
>
> Moreover, there is nothing in the legislative history to suggest that Congress intended to create a private right of action for treble damages for violations of substantive statutes by ordinary business or parties. For example, it was clearly established at the time that RICO was enacted that there was no private right of action for violations of the mail fraud statute. It is implausible that Congress could have meant to alter this accepted rule to the extent of creating a right of action for treble damages without a single mention of such a revolutionary consequence anywhere in the legislative history. 553 F. Supp. at 1361.

The injuries suffered by Bankers were a direct consequence of the predicate acts and thus are not under any definition of a RICO injury within the ambit of § 1964(c). The facts alleged by Bankers strongly suggest a sinister scheme to defraud the bank and other creditors of the monies they lent in good faith to BAC. But however reprehensible defendants' actions were, the harm they have allegedly caused Bankers was directly caused by an ordinary, albeit complex, bankruptcy fraud. If the injuries to Bankers in this case are sufficient to satisfy the requirements of § 1964, then virtually every bankruptcy fraud could serve as the basis for a treble damage action under RICO. Nor can defendants' participation in the alleged bribery in South Carolina serve to promote Bankers' fraud claim into the treble damage action. The bribe was merely one facet of defendants' plan to impede Bankers' collection efforts through a complicated scheme of phony transfers and baseless court actions. Bankers' injuries were a direct result of these acts and not a consequence of any independent pattern of racketeering

activity. Bankers' RICO allegations add nothing to the substance of its claims.

Accordingly, for the reasons stated above, the motions for judgment on the pleadings dismissing the complaint for failure to state a claim are granted.[10] The complaint is dismissed as to all defendants.

SO ORDERED.

/s/ WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
June 29, 1983

10 In view of this conclusion, the Court finds it unnecessary to consider any of the additional points raised by Soifer.

Opinion of the Second Circuit in *Sedima v. Imrex*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 796—August Term, 1983

(Argued February 1, 1984 Decided July 25, 1984)

Docket No. 83-7965

SEDIMA, S.P.R.L.,

Appellant,

—v.—

IMREX COMPANY, INC.,
GIDON ARMON and JACOB ARMON,

Appellees.

Before:

LUMBARD, OAKES, and CARDAMONE,
Circuit Judges.

Appeal from judgment by the United States District Court for the Eastern District of New York (Glasser, J.), dismissing claims under the Racketeer Influenced and

Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982) (RICO), for failure to allege a "RICO-type injury" in a complaint alleging business fraud.

Affirmed for the reasons stated by the district court and for the additional reason that appellant's RICO claims were based on predicate acts listed in 18 U.S.C. § 1961(1) in the absence of criminal convictions of such acts.

FRANKLYN H. SNITOW, New York, N.Y. (William H. Pauley, III, Keith S. Orenstein, Orenstein, Snitow & Pauley, New York, NY, of counsel), *for Appellant*.

RICHARD EISENBERG, Garden City, N.Y. (Shaw, Goldman, Licitra, Levine & Weinberg, Garden City, NY, of counsel), *for Appellees*.

OAKES, *Circuit Judge:*

This is another in the new wave of cases involving "private civil RICO"—the private right of action found in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982). Appeal is from a judgment, designated as final pursuant to Fed. R. Civ. P. 54(b), of the United States District Court for the Eastern District of New York, I. Leo Glasser, Judge, dismissing the RICO claims in appellant's amended complaint. We affirm.

Facts

This case involves business fraud. Plaintiff-appellant Sedima S.P.R.L. (Sedima) is a Belgian corporation in the business of importing and exporting to and from Belgium electronic, mechanical and hydraulic parts manufactured in the United States and abroad. Appellee Imrex is an American corporation engaged in exporting aircraft and aircraft-related electronic component parts. Appellees Jacob Armon and Gidon Armon are officers of Imrex.

In 1979, Sedima and Imrex entered into a joint venture to provide electronic component parts for a NATO subcontractor in Belgium. Imrex obtained the parts and shipped them to Europe pursuant to orders secured by Sedima. Sedima allegedly secured approximately $8.5 million worth of orders to be placed through Imrex.

Sedima alleges that Imrex and the Armons fraudulently prepared purchase orders, invoices and credit memoranda for Sedima that they knew falsely overstated purchase prices, attendant costs and shipping and financing charges of the parts purchased on behalf of the joint venture. The complaint further alleges that Imrex received monies belonging to the joint venture pursuant to these fraudulent purchase orders, invoices and credit memoranda. In addition to counts alleging breach of contract, breach of fiduciary duty, unjust enrichment, breach of the joint venture agreement, conversion, breach of a constructive trust and a cause of action based on quasi contract, three of the counts allege violations of RICO, 18 U.S.C. § 1962(c).[1]

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1 18 U S.C. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly

Two of the RICO counts allege that the fraudulent purchase orders, invoices and credit memoranda constitute a pattern of racketeering activity, the predicate acts being separate and numerous violations of the Mail Fraud Act, 18 U.S.C. § 1341 (1982) and the Wire Fraud Act, 18 U.S.C. § 1343 (1982). The third count charges a RICO conspiracy under 18 U.S.C. § 1962(c) and (d).[2] Sedima seeks treble damages and reasonable attorneys' fees under these RICO counts. 18 U.S.C. § 1964(c).[3]

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or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

2 18 U.S.C. § 1962(d) provides:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

3 18 U.S.C. § 1964 provides:

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States

The District Court Decision

Judge Glasser dismissed the RICO counts on the basis that there was a failure to allege a RICO-type injury. In so holding, he relied on a series of decisions, discussed *infra*, which have stated that in order for an injury to be "by reason of a violation of section 1962," as required by section 1964(c), something more than or different from injury that would result from the predicate acts alone must be shown by the plaintiff. *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 206-09 (E.D. Mich. 1981); *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980).

The district court adopted the reasoning of two related lines of cases. One series of cases, relying on an analogy between RICO and the antitrust laws, requires that a RICO plaintiff allege a "competitive injury," that is, an injury to business or property stemming from competitive harm. *North Barrington*, 547 F. Supp. at 210-11, *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982); *Feldesman*, 566 F. Supp. at 1241. The other series of cases requires plaintiffs to allege a "racketeering enterprise injury," an injury that occurs where "a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise." *Landmark Savings*, 527 F. Supp. at 209, relying upon Note, *Reading the Enterprise Element Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. U.L. Rev. 100, 125-33

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under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(1981). Judge Glasser found no allegation of any injury in this case apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud, and accordingly dismissed the RICO counts.

Background

The problem addressed by the district court, which has received much attention both in the courts and among commentators, is that a broad reading of the civil RICO provisions would allow plaintiffs to bring suit in federal court[4] under RICO nearly anytime they could allege injury caused by two acts which are violations of any one of the predicate acts listed in RICO. Since these predicate acts include a great many state law violations, federal securities law violations, and federal mail and wire fraud violations, an expansive interpretation of RICO allows plaintiffs to bring into federal courts many claims formerly subject only to state jurisdiction, and to bypass remedial schemes created by Congress, particularly in the securities area. The fact that successful RICO plaintiffs may obtain treble damages and attorneys' fees provides, of course, additional incentives to plaintiffs to categorize their actions as RICO claims.

Section 1964(c) states that anyone "injured" "by reason of" a violation of section 1962 is entitled to treble damages. Section 1962 "violations" include conducting "enterprises" "through a pattern of racketeering"; a "pattern of racketeering" is defined by section 1962(5) as

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4 Recently at least one state court has exercised jurisdiction over a federal civil RICO claim. *See Greenview Trading Co. v. Hershman & Leicher P.C.*, N.Y.L.J. Mar. 13, 1984, at 5, col. 3 (N.Y. Sup. Ct.); Flaherty, *Two States Lay Claim to RICO*, Nat'l L. J., May 7, 1984, at 3, col. 1.

two or more "acts of racketeering" occurring within a given time. "Acts of racketeering" are defined by section 1961(1), inter alia, as any of a number of acts "chargeable under State law," acts "indictable" under a variety of federal laws, or an "offense" under the federal securities law. Thus, ignoring for the moment some troubling ambiguities, the statute on its surface seems to allow private suits for people injured by defendants who have committed two so-called predicate acts.

Given this language it is not surprising that there has been an explosion of civil RICO litigation. Only a few cases including civil RICO claims were published in the decade following passage of the Act in 1970;[5] a law review note asserts that courts published only two opinions dealing with civil RICO by 1978 and only thirteen by early 1981. Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 n.7 (1982). There are now over 100 published decisions. Siegel, *"RICO" Running Amok in Board Rooms*, L.A. Times, Feb. 15, 1984, at 1. This development has resulted, no doubt, from the bar's increased awareness of the statute, spawned, perhaps, by an influential law review article coauthored by Professor G. Robert Blakey and Brian Gettings which proposed a broad reading of the statute. Professor Blakey's position as chief counsel to the Senate subcommittee which proposed RICO has evidently given his expansive views of the statute special

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5 This is true though there were some law review commentaries dealing with the subject, particularly in reference to the Seventh Circuit's *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974). *See* Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970—United States v. Cappetto*, 25 DePaul L. Rev. 508 (1976); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192 (1975).

credence.[6] A veritable wave of commentaries and cases making civil claims along lines suggested by Blakey and Gettings and others has occurred. We are told that there is now indeed a "RICO bar" which specializes in bringing or defending RICO claims. And members of that "bar" have found, as would appear obvious, that the stigma associated with the label "racketeering" is a good settlement weapon.[7] Indeed, a current adage is said to be that "RICO provides the only *civil* action where the defendant pleads not guilty." Bridges, *supra* note 6 at 44.

The problem with civil RICO is not the explosion of federal litigation. Congress is of course free to create federal causes of action for civil litigants within constitutional limits not necessarily in question here. *But see infra* notes 24, 49. But there is simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow.

The Racketeer Influenced and Corrupt Organizations Act, as its very name implies, was designed to combat organized crime. The damage done by organized crime was the subject of much public concern and congressional

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6 Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980).

Professor Blakey was the chief counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970 when, as he puts it, "the Organized Crime Control Act of 1970 . . . was processed." *See id.* at 1009 n.*. His writings are listed in Bridges, *Private RICO Litigation Based on "Fraud in the Sale of Securities"*, 18 Ga. L. Rev. 43, 46 n.20 (1983); *but see id.* 76-77 n.165; *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581 n.16, 582 n.17 (N.D. Ill. 1983). *See also infra* note 20.

7 *See* Bridges, *supra* note 6, at 47 & nn.27-28 and sources cited therein; Granelli, *Playing for Keeps with State RICO*, Nat'l L.J., July 5, 1982, at 1, col. 4; at 8, col. 1; *RICO the Enforcer*, Newsweek, Aug. 20, 1979, at 82.

activity throughout the 1950s and 1960s.[8] RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. Law 91-452 (1970), an act designed "to seek the eradication of organized crime in the United States . . . by providing new remedies to deal with unlawful activities of those engaged in organized crime." 116 Cong. Rec. 35191 (1970).

Title IX itself was designed "to protect legitimate businesses against the syndicate's infiltration."[9] It was an attempt to deal with organized crime as an economic phenomenon. In so doing, its enforcement provisions were modeled after the enforcement provisions of the antitrust laws. *See, e.g., infra* text accompanying note 26.

Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch,[10] to name a few

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8 *See* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 837-39 & nn.4, 9-15 (1980).

9 *Subcomm. No. 5 of the House Comm. on the Judiciary, Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, [hereinafter "House Hearings"] 91st Cong., 2d Sess. 157 (1970) (Statement of Attorney General Mitchell). *See also* 116 Cong. Rec. 35200 (1970) ("Title IX . . . is aimed at keeping organized crime out of legitimate businesses through the use of both criminal and civil penalties.") (Statement of Congressman St. Germain); Bradley, *supra* note 8, at 840-42 (review of legislative history).

10 *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231 (S.D.N.Y. 1983); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F.

defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

Though there are a few reported cases where RICO has been used against reputed mobsters[11] or at least against organized criminals,[12] it is being far more frequently used for purposes totally unrelated to its expressed purpose. It has become a standard practice, for example, to insert a RICO claim in litigation involving tender offers.[13] It has become commonly used, as here, in typical business fraud cases,[14] in so-called "garden variety" securities fraud cases,[15] and in bank fraud cases.[16]

RICO, then, presents a classic case of a statute whose ambiguous language needs to be construed in light of Congress's purpose in enacting it.[17] The need to discern

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Supp. 352 (E.D. Mich. 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983).

11 *E.g.*, *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981).

12 *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061 (S.D.N.Y. 1983).

13 *E.g.*, *In re Action Indus. Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983).

14 *E.g.*, *Adair v. Hunt Int'l Resources Co.*, 526 F. Supp. 736 (N.D. Ill. 1981).

15 *E.g.*, *Trane Co. v. O'Connor Secs.*, 561 F. Supp. 301 (S.D.N.Y.), *vacated as moot*, 718 F.2d 26 (1983).

16 *E.g.*, *Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981), *overruled*, *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983).

17 *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). *See also United Steelworkers of America v. Weber*, 443 U.S. 193, 201-02 (1979); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947). *See also United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an

legislative intent is particularly important when, as here, crucial statutory language is drawn *in haec verba* from another statute where it has a peculiar technical meaning. The law itself calls for reference to legislative intent since the liberal construction clause states that the text should be construed to "effectuate its remedial purpose." We are, then, obliged to study the legislative history of RICO and particularly of section 1964(c) to inform our reading of that statute and, in particular, of the scope of the private civil remedy created by the Congress.

Legislative History

The legislative history of the Organized Crime Control Act of 1970 gives little hint of the intended scope of private action under civil RICO. While the Act for the most part originated in the Senate, the civil provision permitting suit by private persons, 18 U.S.C. § 1964(c), originated in the House.[18] Consequently it is not men-

unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words" (citing *Ozawa v. United States*, 260 U.S. 178, 194 (1922))).

18 RICO had a long legislative lineage. The Organized Crime Control Act of 1970 was derived from S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 769 (1969). Title IX of the Act, RICO, was added to S. 30 by the Senate. The substance of Title IX was contained in an earlier Senate bill, S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-71 (1969). Neither S. 1861 nor S. 30 contained a private civil cause of action. An earlier predecessor of RICO, S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-96 (1969), did contain a private civil cause of action based closely on the Clayton Act, providing explicitly for injunctive relief as well as for treble damages. S.1623 §§ 3(c), 4(a). That bill was itself patterned on two earlier Senate bills, S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967), both of which contained civil private actions similar to that in S. 1623. The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S. 1623 with S. 1861 apparently in part because S. 1861 provided broader governmental civil relief, such as the investigative demand, and was in other ways a more comprehensive bill. *See Hearings on Measures*

tioned in the Senate Report, although the other three subsections of section 1964 that were included in the Senate bill are discussed. This fact, we believe, is critical to consideration of the legislation. This is true because the "[c]ivil approach" discussed in the report of the Senate Judiciary Committee accompanying S. 30, Rep. No. 91-617, 91st Cong., 1st Sess. 80-83 (1969), refers solely to the Government's right to seek and obtain injunctions to prevent and restrain violations of section 1962 through divestment by individuals of their interest in enterprises, imposing restraints on future activities or investments, or ordering dissolution or reorganization of any enterprise. *Id.* at 24. Consequently any comments in the Senate Report analogizing to the antitrust laws, referring to the American Bar Association position in the Senate hearings, or otherwise pertaining to the Senate's "[c]ivil

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Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 91st Cong., 1st Sess. 387 (1969) [hereinafter, "Hearings on S. 30"]; Bradley, *supra* note 8, at 841-42 & nn.27-28. There is no discussion in the legislative history indicating why S. 1861 did not provide a private cause of action. Professor Blakey, then Chief Counsel to the Senate Subcommittee, subsequently has written that the private civil section was dropped "in an effort to streamline [the bill] and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies." Blakey & Gettings, *supra* note 6, at 1017-18.

There were also a number of House predecessors to RICO which paralleled S. 30. *See* H.R. 19215, 91st Cong., 2d Sess., 116 Cong. Rec. 31914, H.R. 19586, 91st Cong., 2d Sess., 116 Cong. Rec. 35242 (1970). The private cause of action section eventually inserted by the House was taken from H.R. 19586. H.R. 19215 included a much more complete private cause of action section, explicitly allowing for private party injunctive relief. *See* Blakey & Gettings, *supra* note 6, at 1020.

While one may or may not agree with Blakey & Gettings that it is "unfortunate" that H.R. 19215 was not used, *id.*, it is significant that it was not. The more general H.R. 19586 was obviously less controversial, less likely to promote debate and hence more likely to result in passage of the bill.

All of the amendments made by the House to S. 30 limited its scope, with the exception of the inclusion of a private remedy.

approach" do not pertain to the scope, impact, or purpose of the private treble damage remedy inserted later by the House of Representatives.[19]

Ultimately the Senate accepted the House amendment adding subsection (c). Apparently, as the session was about to end, the Senate did not ask for a conference.

The legislative history on the House side is not much more instructive. The decision to add a civil private damages provision was made by a House subcommittee at the behest of Representative Sam Steiger and the American Bar Association.[20] The addition was not considered

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19 Failure to recognize this crucial point has led a number of courts and commentators astray. For example, the original Eighth Circuit panel in *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361, *cert. denied sub nom. Prudential Ins. Co. of America v. Bennett*, 104 S. Ct. 527 (1983), states that "section 1964(c) provides a private cause of action modelled on the antitrust laws" and then for its first citation to this effect refers to S. Rep. No. 617, 80-82, 125, 160 (1969). Yet every statement made in that Senate Report relates exclusively to civil remedies *not* including a private civil right of action, but only concerning the government's right to seek an injunction or forfeiture under the provisions of section 1963(a). This is not to say, of course, that the House insertion of the private treble damage action was not based on an analog to the antitrust laws, for it is obviously somewhat patterned in part after section 4(a) of the Clayton Act. 15 U.S.C. § 15(a) (1982). Indeed, the testimony of Edward L. Wright, then ABA president, in the House hearings on S. 30, the absolutely critical testimony leading to the inclusion of section 1964(c) in the House version of the bill, says only:

> In the portion seeking to add a proposed Section 1964, "Civil Remedies," we would recommend an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act. Section 4 provides as follows: [quoting 15 U.S.C. § 4].

House Hearings, *supra* note 9, at 543-44.

20 House Hearings, *supra* note 9, at 520 (Proposal of Rep. Steiger), 548 (Proposal of the American Bar Association). Both proposals were patterned on the private remedy found in the Clayton Act. Significantly Steiger's proposal, like those in the rejected Senate bills, provided explicitly for a private injunctive remedy. *Id.* at 521. The legislative history is silent as to why the subcommittee rejected this language and explicitly created only the private action for treble

an important one, a remarkable fact which in itself indicates that Congress did not intend the section to have the extraordinary impact claimed for it. Indeed, when the Judiciary Committee initially introduced the amended

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damages which was eventually enacted as § 1964(c). The adopted statutory language was drawn from H.R. 19586, 91st Cong., 2d Sess. 56 (1970), one of the two House bills which paralleled S. 30. In choosing H.R. 19586 over H.R. 19215, 91st Cong., 2d Sess. (1970), the House explicitly rejected a private injunctive relief section. *See supra* note 18.

Later, on the House floor, an amendment also offered by Representative Steiger to provide private injunctive relief was withdrawn before the House could vote on it. 116 Cong. Rec. 35346 (1969). In the next term of the Senate the same amendment was proposed as a bill, S. 16, 92nd Cong., 1st Sess. (1971), as a way to "expand the available civil remedies" since "[n]ow only the United States can institute injunctive proceedings." *See Victims of Crime, Hearing before the Subcom. on Criminal Laws and Procedures of the Senate Com. of the Judiciary*, 92nd Cong., 1st Sess. 158 (1972) (Statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) [hereinafter "Victims of Crime"]. While post-enactment legislative history is not by any means conclusive, it cannot merely be ignored. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1982). It thus seems altogether likely that § 1964(c) as it now stands was not intended to provide private parties injunctive relief. *But see Aetna Cas. and Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 909-10 (E.D.N.Y. 1983) (injunctive relief granted), *aff'd on other grounds*, No. 83-7728, slip op. at 2510 (2d Cir. Mar. 26, 1984). Two other courts of appeals have reserved judgment on this issue. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Bennett v. Berg*, 685 F.2d at 1064.

Professor Blakey also disagrees with this conclusion, making a rather remarkable argument based upon the use of the word "and" in § 1964(c), as follows. He states:

> A Congressional grant of the right to sue in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946). Significantly, the treble damage clause of § 1964(c) is preceded by "and" and not "to." *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (grant of right in one form implies denial of right in another). Consequently, the availability of comprehensive civil relief should prove of particular significance, for example, in the area of government fraud at the state and local level.

Blakey & Gettings, *supra* note 6, at 1038 n.133.

We do not find it significant that the word "and" is used in § 1964(c), especially since its treble damage antitrust analog, § 4 of the

bill, it did not even announce to the House that it had made the addition.[21] It was only in the middle of the second and last day of House discussion of the bill that a member of the committee noted that

> at the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.[22]

Clayton Act, 15 U.S.C. § 15(a) (1982), uses the same word, "and," while a different specific statutory provision of that act expressly gives a private antitrust plaintiff the right to seek an injunction (except when a common carrier is a defendant). Clayton Act § 16, 15 U.S.C. § 26 (1982). We endorse Judge Shadur's comment that an argument based on the word "and" is "bizarre and wholly unconvincing as a matter of plain English." *Kaushal v. State Bank of India*, 556 F. Supp. 576, 582 & n.17 (N.D. Ill. 1983). Indeed, the Supreme Court has explicitly held that the parallel language of § 4 of the Clayton Act *precluded* private injunctive relief. *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917); *Minnesota v. Northern Secs. Co.*, 194 U.S. 48 (1904).

21 One Judiciary Committee member indicated on the floor that three changes had been made from the Senate bill "merit[ing] discussion," but did not include the addition of the private cause of action among these three. 116 Cong. Rec. 35197-98 (1970) (remarks of Congressman McCulloch).

22 116 Cong. Rec. 35295 (1970) (remarks of Congressman Poff). Beyond this cursory statement, there are only two indications that the House was even made aware of the fact that the bill included a private cause of action. First there was Representative Steiger's amendment, quickly withdrawn, to add an injunctive remedy to the private action. *See* discussion *supra* note 20. More significantly, Representative (now Judge) Mikva offered an amendment providing for treble damages for defendants who became subjects of frivolous suits under the section. *See* 116 Cong. Rec. 35342-43 (1970). The evident purpose of this amendment, which was quickly defeated, *id.*, was to point out the dangerous overbreadth of the section, which Mikva claimed was a "dangerous tool . . . given to a competitor who wants to go after somebody who is competing too vigorously against him." *Id.* at 35342. We decline to infer from Representative Mikva's comments the conclu-

This brief remark is one of only three statements regarding section 1964(c) made on the House floor. *See supra* note 22.

The House subcommittee hearings[23] are not much more helpful. Although they contain useful analysis of the purposes for creating civil remedies for the government,[24] and generally for applying antitrust type civil remedies in the fight against organized crime,[25] most of this discussion took place before the private remedy was added to the bill. Thus, although there was testimony that section 1964 was too broad,[26] none of that testimony was addressed to the private cause of action provision. The only discussion accompanying the introduction of the private

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sion that Congress intended to promulgate a statute as broad as the one he feared it was passing. Deriving legislative intent from a dissenting congressman's "parade of horrors" speeches in opposition is a notoriously dubious practice.

23 House Hearings, *supra* note 9.

24 *Id.* at 106 (Statement of Sen. McClellan). It was thought wise to provide the government with civil remedies as a way around the "one-sided" procedural protections afforded criminal defendants in American courts. *Id.* As to the constitutional permissibility of avoiding the procedural protections built into the criminal law by labelling a proceeding "civil," *see* Note, *Criminal Law—Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 Texas L. Rev. 1055 (1975); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192 (1975); *see also* Comment, *Constitutional Issues Raised by the Civil-Criminal Dichotomy of the Maine OUI Law*, 35 Me. L. Rev. 385 (1983). Civil remedies were also found to be a useful way to expand the nature of relief available to the federal prosecutors. House Hearings, *supra* note 9, at 107.

25 *See* House Hearings, *supra* note 9, at 147-49 (report of the ABA).

26 In particular, representatives of the Association of the Bar of the City of New York and of the American Civil Liberties Union objected to the scope of Title IX. *See* House Hearings, *supra* note 9, at 327-31 (Ass'n of the Bar report), 499-518 (statement and testimony of ACLU).

action came in a statement by Representative Steiger, who wrote that such an amendment would enable "those who have been wronged by organized crime [to] at least be given access to a legal remedy" and that it would also "enhance the effectiveness of Title IX's prohibitions."[27]

Nor do the House's broad pronouncements on the purposes of Title IX or on the meaning of its other sections reveal Congress' intent in promulgating the private action. The House Report in its introductory section refers, inter alia, to the purpose of "proscribing the operation of any enterprise engaged in interstate commerce through a 'pattern' o[f] 'racketeering activity.' " H. Rep. No. 91-1549, 91st Cong., 2d Sess. 35, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4010 (1970). It states that " '[r]acketeering activity' is defined in terms of specific State and Federal criminal statutes." *Id.* It adds that "[t]he title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." *Id.*

The section by section explanation is hardly more helpful. Referring to section 1961(1)[28] which defines

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27 *Id.* at 520.

28 18 U.S.C. § 1961 provides in part:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangeous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investiga-

"racketeering activity," the report says that that term is defined

> to include murder, kidnaping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury, mail, bankruptcy, wire and securities fraud, and obstruction of justice. State offenses are included by generic designation. Federal offenses are included by specific reference. The term "racketeering activity" is a key statutory term. Under section 1962 below, racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, or no collection of an "unlawful debt" there can be no violation of the provisions of this title.

Id. at 56, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4032. The House Report defines "pattern of racketeering activity" only by referring to the section 1961(5)[29]

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tions), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds, or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .

29 18 U.S.C. § 1961(5) provides:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date

definition that it is the equivalent of at least two acts of racketeering activity occurring within a given time period. *Id.* The report deals with section 1962 by saying that it "establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations," noting that subsection (c) "prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt." *Id.* at 57, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4033. In reference to the civil remedies provided in section 1964(c) for the violation of section 1962, the report merely paraphrases the language of section 1964(c).

The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications.

The clanging silence of the legislative history, coupled with the section's use in areas far afield from the battle against organized crime, has led some, though concededly not all, courts to read various limitations into the act in

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of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

order to conform its use to that thought to best effectuate the congressional purpose.

Four such limitations have been widely considered: (1) whether RICO requires some nexus between the challenged activity and organized crime; (2) whether the injury complained of must result from "enterprise" involvement in the racketeering, rather than directly from the activity itself; (3) whether plaintiffs must allege a "competitive" or "racketeering injury"; and (4) whether there must be criminal convictions for the predicate acts underlying a civil RICO suit.

Even a cursory review of the case law indicates that there is simply no consensus on what RICO requires. While some courts have held that only those activities with some connection to organized crime may be the subject of civil RICO suits,[30] others, including this circuit,[31] have rejected this limitation.[32] Similarly, although some courts have read RICO to require a showing of

30 *E.g., Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981). *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981), *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975).

31 *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom. Moss v. Newman*, 104 S. Ct. 1280 (1984).

32 *E.g., Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); *Schact v. Brown*, 711 F.2d 1343, 1356 (7th Cir.), *cert. denied*, 104 S. Ct. 508 (1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983); *Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983); *Windsor Assoc., Inc. v. Greenfeld*, 564 F. Supp. 273, 277 (D. Md. 1983); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1351 (E.D. Pa. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 719 (D.D.C. 1983); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667, 669-70 (W.D. Mich. 1983); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49 (N.D. Cal. 1982); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247 (S.D.N.Y. 1981).

"competitive"[33] or "racketeering"[34] injury, more have held against imposing such limitations.[35] Finally, courts

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33 *E.g.*, *Bankers Trust v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) ("plaintiff must allege how it was injured competitively by the RICO violation in order to state a cause of action under § 1964(c)").

34 *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *King v. Lasher*, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 852 (E.D. Va. 1983); *Guerrero v. Kafzen*, 571 F. Supp. at 721 (injury "by reason of a RICO violation"); *Van Schaick*, 535 F. Supp. at 1137 & n.11 (commercial or business injury required); *Harper v. New Japan Secs. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (C.D. Cal. 1982); *Gitterman v. Vitoulis*, 564 F. Supp. 46, 49 (S.D.N.Y. 1982); *Landmark Savs. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

35 The following are among the cases that have rejected a "competitive injury" requirement: *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d at 1288; *Schacht v. Brown*, 711 F.2d at 1358; *Bennett v. Berg*, 685 F.2d 1053, 1059 (1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom. Prudential Ins. Co. of America v. Bennett*, 104 S. Ct. 527 (1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983) (also finding racketeering injury indistinguishable from competitive or commercial injury); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. at 1240; *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Gitterman v. Vitoulis*, 564 F. Supp. at 48; *USASCO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 814 (W.D. Ky.), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982); *Crocker Nat'l Bank*, 555 F. Supp. at 49.

The following cases have rejected a "racketeering injury" requirement: *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. at 1240; *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. at 278-79 (also finding racketeering injury "analytically indistinguishable" from argument that RICO applies only to organized crime); *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983).

Commentators too have disagreed about the propriety of a "racketeering injury" requirement. *Compare* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1109-14 (1982) (limitation unprincipled) [hereinafter "Note, Civil RICO"] *with* Comment, *Reading the "Enterprise" Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. L. Rev. 100, 126-32 (1981) (supporting a standing requirement); Bridges, *supra* note 6, at 71-73 (*id.*).

have split on whether there must be criminal convictions for the predicate acts prior to institution of a private civil RICO suit. *See* cases cited at *infra* note 42.

We have as yet little guidance from the Supreme Court as to which, if any, of these different understandings of RICO's private civil remedy is appropriate. In holding in *United States v. Turkette*, 452 U.S. 576 (1981) that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises, and that an enterprise must be an entity separate and apart from the pattern of activity in which it engages, 452 U.S. at 587, the Court said in reference to the civil remedies that "[a]s a general proposition, however, the civil remedies could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal." It went on to say that "[t]he aim is to divest the association of the fruits of its ill-gotten gains." *Id.* at 585. The Court concluded that it is "untenable" that the existence of the civil remedies "limits the scope of this criminal provision." *Id.*

The Court recognized that Congress, in passing RICO, intended to "alter somewhat the role of the Federal Government in the war against organized crime," *id.* at 587, and rejected the lower court's view that in order to right "the balance between federal and state enforcement of criminal law" it was obliged to read narrowly the statutory definition of "enterprise." *Id.* at 586-87. However, the Court was only discussing congressional intention as to the criminal enforcement provisions of RICO, not the intended scope of the private civil remedy. *Id.* Similarly, the Court's invocation of the plain meaning rule as regards the Congressional definition of "enterprise" in 18 U.S.C. § 1961(4), 452 U.S. at 580-81, provides little or no guidance as to the handling of the

very real ambiguities, which we discuss below, surrounding the complex statutory scheme providing for the private civil remedy. *See Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1005-06 (C.D. Cal. 1982).[36]

Discussion

I. *Injury by Reason of Racketeering Activity.*

We agree with the district court that the appellant has failed to allege any injury to its business "by reason of a violation of section 1962," as required by section 1964(c). The "by reason of" standing limitation to RICO has been endorsed by a great many district courts. *See* cases cited in *supra* notes 33-34. They argue that the "by reason of" language was put into the statute by Congress as a way to limit standing to sue under RICO to people hurt by an injury of the type RICO was intended to prevent. RICO was intended not simply to provide additional remedies for already compensable injuries,[37] but rather to provide

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36 In another recent criminal RICO case the Court similarly rejected a narrow reading of the word "interest" in § 1963(a)(1). *Russello v. United States*, 104 S. Ct. 296, 300 (1983). As it did in *Turkette*, the Court relied upon the plain meaning of the statutory language, also making reference to the liberal construction clause in RICO. *Id.* at 302. The Court also repeated its conclusion that the legislative history of RICO suggests that Congress intended the criminal provisions to be given a broad construction. *Id.* at 302-03.

37 *United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977) ("State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations; it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity."). *Cf. United States v. Bledsoe*, 674 F.2d 647, 659 (8th Cir. 1982) ("RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes."), *cert. denied sub nom. Phillips v. United States*, 103 S. Ct. 456 (1982).

added remedies and procedures to fight certain specific kinds of organized criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here.

The justification for this limitation is not derived solely from the language of the statute.[38] Instead, many courts focus on the fact that the "by reason of" language is drawn directly from section four of the Clayton Act. In that act the language has been construed to require plaintiffs to allege and prove an "antitrust injury," *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S.

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38 It can be argued that a "pattern of racketeering activity" is defined merely in terms of predicate offenses and nothing more, § 1961(1), (5), so the fact that racketeering activity must be proved under § 1964(c) does not in itself require that something other than the predicate offenses be proved. On the other hand the statutory definition states that a pattern "*requires* at least two acts of racketeering activity . . . ." 18 U.S.C. § 1961(5) (emphasis added). An argument can be made that the use of the word "requires" instead of the word "means" implies that Congress left it to the courts to define the contours of the concept of "pattern." *See* Bridges, *supra* note 6, at 64-65 & n.119. Here Senator McClellan's observations, quoted in *id.* at n.118, may assume importance:

> The [ACLU] offers an inaccurate and prejudicial criticism of title IX when it states that "pattern of racketeering activity" is defined as two or more acts of "racketeering activity," and worries that a person could be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses, one of which related to an interstate business. Again, a careful reading of title IX would have informed the union that a pattern under title IX is not defined as two or more acts of racketeering activity, but requires them.
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> The term "pattern" itself requires the showing of a relationship, and the committee report . . . thus reinforces that interpretation. So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern and the ACLU's fears are unwarranted.

116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan).

477, 489 (1977), which the Supreme Court has defined as "injury of the type the antitrust laws were intended to prevent." *Id.* By analogy, then, the "by reason of" language in section 1964(c) is intended to limit standing to those injured by a "racketeering injury," by an injury of the type RICO was designed to prevent. *See, e.g., In re Action Industries Tender Offer*, 572 F. Supp. at 851-52; *Johnsen v. Rogers*, 551 F. Supp. at 285.

Two kinds of questions have, however, been raised in relation to finding a standing requirement analogous to the Clayton Act's in RICO's "by reason of" language. First, courts and commentators have argued that the legislative history demonstrates that Congress did not intend to have the Clayton Act's standing requirement applied to RICO. *E.g. Schact v. Brown*, 711 F.2d at 1357-58; Blakey & Gettings, *supra* note 6, at 1015-17 & nn.24-32, 1041. The second question has to do with defining precisely what is meant by a "racketeering injury."

One of the Senate predecessors to RICO was framed as an amendment to the Clayton Act. S. 2048, 90th Cong., 1st Sess. (1967). This approach was rejected by the House Judiciary Committee in part because it was thought that the strict standing requirements of the Clayton Act should not have to be met by plaintiffs suing under RICO. House Hearings, *supra* note 9, at 149 (Statement of the Antitrust Section of the ABA). Similarly, on the Senate floor a number of Senators explicitly rejected the idea of "imputing the great complexity of antitrust law enforcement" to RICO,[39] although this discussion did not refer to the *private* civil action which, as we have noted,

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39 115 Cong. Rec. 9567 (1969) (Statement of Senator McClellan). *See also* 115 Cong. Rec. 6993 (1969) (Statement of Senator Hruska).

was added to the bill only after it had left the Senate. The legislative history suggests that it would therefore beinappropriate to carry over wholesale all of the elaborate antitrust standing case law onto RICO. It would no doubt violate both the congressional purpose and common sense to require RICO plaintiffs to allege an injury of the type the *antitrust* laws were designed to prevent to maintain a RICO suit.

On the other hand, there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the "by reason of" language. By borrowing language imposing a standing limitation, it is reasonable to believe that Congress indicated a desire to have an analogous standing limitation imposed in RICO.[40]

The question then becomes what kind of injury is a "racketeering injury"? As has been said, RICO was intended to "address the infiltration of legitimate business by organized crime." *Turkette*, 452 U.S. at 591. According to the congressional statement of findings and purpose, the Act was to seek to eradicate organized crime because "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations,

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40 Thus, in an interesting paper in the post-legislative history, the American Law Division of the Library of Congress, after reviewing the purposes of RICO and of the antitrust laws, concluded that "[g]iven the similarity of language and circumstances between the antitrust provisions and those of the Organized Crime Control Act, there is no reason to believe that many of these [antitrust] principles and problems would [not] be applicable to both [antitrust and RICO] types of cases." *Reprinted in* Victims of Crime, *supra* note 20, at 331. *See Landmark Savs. & Loan*, 527 F. Supp. at 208-09 ("Competitive injuries and racketeering enterprise injuries would frequently overlap, but they are not necessarily the same."). *See also* Bridges, *supra* note 6, at 68-73 & nn.133-34.

interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *See also* legislative history cited in *Bridges*, *supra* note 6, at 68-72 & nn.133-39. RICO was not enacted merely because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors. It was to help solve this problem that Congress added RICO to the arsenal of weapons used to fight organized crime. It is only when injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted.

This is, we repeat, by no means to say that standing to sue under RICO should be limited only to people who have standing to sue for a competitive injury under the antitrust laws.[41] This is so because Congress in promulgat-

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41 For example, recent antitrust cases which focus on market efficiency rather than on damage to business people, *see, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977), are not relevant to the requirements of RICO standing. Nothing in RICO suggests, then, that only competitors can sue, or that Congress in enacting RICO was more concerned with economic efficiency than with providing remedies for victims of organized crime. *See* Note, *Civil RICO*, *supra* note 35, at 1113-14 ("RICO's explicit aim to promote free competition focuses as much on insuring a fair market as on insuring an efficient one. Thus, the state should protect the plaintiff injured competitively by a corrupt business even at a cost to market efficiency.").

Similarly, claims alleging the kinds of business fraud which often affect competition should go forward under RICO even if in the particular case no harm to competition results, as, for example, when all competitors are being extorted from equally. For example, in *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981), a company was forced to pay kickbacks to an illegal enterprise for required services. A RICO claim was allowed even though defendant claimed that the inflated price was still reasonable so that no injury to

ing RICO was addressing the kind of economic injury which has an effect on competition, but nowhere suggested that actual anticompetitive effect is required for suits under the statute. For purposes of clarity, it is better to identify the RICO standing requirement as a "racketeering injury" requirement rather than a "competitive injury" requirement, as the latter term may incorrectly suggest that all of the details of the antitrust law standing requirement are being incorporated by reference. This carries with it at least, as the trial judge found, the obligation that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.

II. *Necessity of a Prior Conviction.*

In *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 29 (2d Cir. 1983), we left "to another day" the question whether a prior criminal conviction is a prerequisite to a civil RICO action. We now hold that it is. A number of cases have discussed the problem with little or no analysis. Even the commentators who would call for an expansive reading of the Act have done likewise, merely citing those same cases in footnotes. *E.g.*, Note, *Civil RICO*, *supra* note 35, at 1103 n.17; Blakey and Gettings, *supra* note 6, at n.129. For reasons that appear below, we cannot agree with these decisions and commentators.

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competition had occurred. It was enough that the plaintiff's alleged injury was the *kind* of injury which Congress identified as threatening competition. The fact that the suit may not have been viable under the Clayton Act shows that the two standing requirements overlap but are not identical.

We do not in this business fraud case attempt to define the scope of the standing requirement when the RICO suit is based upon securities law violations.

A. *The Case Law.*

United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), is the case most frequently relied upon by courts which have held that criminal convictions are not required before private civil actions may be maintained. *Cappetto*, however, dealt solely with the government's right, in the absence of a criminal conviction, to sue for an injunction under section 1964(1) to prevent or restrain violations of RICO. The case held that Congress was entitled to make civil equitable relief available to the government to prevent or restrain certain actions under subsection 1964(a). In so doing, the court relied on a long series of cases which hold that the government is entitled to bring civil suits for acts which are also punishable as crimes, especially when it is seeking remedial equitable relief and not punitive relief. 502 F.2d at 1356-57. Thus, far from determining the question of the intended or appropriate scope of the treble damage remedy provided to private parties under subsection 1964(c), *Cappetto* made no holding with respect to private civil actions. As a matter of policy, government actions and private actions are of course very different. Prosecutorial discretion, and in the case of RICO, guidelines from the Department of Justice, protect against overbroad use of RICO. *See United States Attorneys' Staff Manual, Executive Office for U.S. Attorneys, RICO Guidelines* (Jan. 30, 1981). There is no comparable way to limit private RICO.

Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978), did squarely hold that section 1964(c) "does not condition that cause of action in any way upon a previous conviction under the criminal provisions of the statute," and adds that it is only neces-

sary that the plaintiff prove the elements of the RICO action by a preponderance of the evidence in order to be awarded damages in a civil action. However, as support for these propositions it cites only to *Cappetto*. 452 F. Supp. at 1280. Almost all other cases that hold that criminal convictions are not necessary rely either on *Farmers' Bank* or *Cappetto* and offer no other reasoning to support their conclusion.[42]

The only other argument put forward for the position that criminal convictions are not required for civil RICO suits is contained in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982). In a footnote the court stated:

> Section 1962 merely describes acts that are "unlawful" under RICO. Section 1963 provides that violations of § 1962 are criminal, just as § 1964(c) provides that violations of § 1962 create a private right of action for damages. If Congress had intended to limit liability under § 1964(c) only to those convicted of or charged with RICO crimes, it would have done so within § 1964(c) by referring to § 1963

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42 *See, e.g., Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981); *Harper v. New Japan Secs. Int'l, Inc.*, 545 F. Supp. 1002, 1007 n.8 (C.D. Cal. 1982); *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391, 396 (S.D.N.Y. 1982); *Heinhold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979). *But see Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1137 n.12 (D. Mass. 1982) (dicta that criminal convictions may be required); *Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019, 1022 n.2 (N.D. Ga. 1981) (*id.*), *overruled on other grounds*, *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983).

Certain other cases holding that criminal convictions are not required have relied in part upon the "liberal construction" language in *Turkette*, 452 U.S. at 580-81. *See USACO Coal Co. v. Carbomin Energy, Inc.*,689 F.2d 94, 95 n.1 (6th Cir. 1982); *cf. Glusband*, 530 F. Supp. at 241 (following *Turkette*'s plain meaning analysis). For reasons we stated previously, we do not find that language in *Turkette* particularly helpful in analyzing this problem.

> or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963.[43]

While this argument is, at least, based upon the statute, we think it is misguided. If Congress had referred to section 1963 in section 1964(c), the result would have been not only to require criminal convictions for the predicate acts before bringing a civil suit, but to require a conviction under *RICO*. By referring to section 1962 in section 1964(c), it is our view that Congress intended to refer to injuries caused by the "unlawful" pattern of racketeering, defined in section 1961(5) as "requir[ing]" two of the criminal acts listed in section 1961(1). Thus people injured by "racketeering activity" may sue, assuming they have standing to sue, whether or not the government has brought an action *under RICO* to punish that activity. As to whether that racketeering activity itself must already have been proven criminal, the question we are facing here, the reference to section 1962 in section 1964(c) provides no indication.

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43 689 F.2d at 95 n.1.

Two other courts have forwarded versions of this same argument. *State Farm Fire & Cas. Co. v. Caton*, 540 F. Supp. 673, 675 (N.D. Ind. 1982); *Parnes v. Heinhold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980). Other courts have relied on *USACO* while holding or saying that criminal convictions are not necessary. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 19 n.15 (2d Cir. 1983) (dicta), *cert. denied sub nom. Moss v. Newman*, 104 S. Ct. 1280 (1984); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 356 (E.D. Mich. 1983); *In re Longhorn Secs. Litigation*, 573 F. Supp. 255, 270-71 (W.D. Okla. 1983).

B. *Statutory Analysis.*

1. *Language.* To determine the scope and content of the civil remedy, the proper place to begin analysis is, as always, the statutory language itself. To start, section 1964 itself draws several distinctions between the government and private persons. Subsection 1964(a) gives the district courts jurisdiction to "prevent and restrain violations" of section 1962; it is not a general grant of jurisdiction and does not relate to subsection (c). Subsection (b) permits the Attorney General to institute proceedings under the section; it was drawn when subsection (c) was not in the statute and relates back to subsection (a).[44]

Study of the particular words chosen by Congress in drafting section 1964(c) is also fruitful. Section 1964(c), as has been noted, "is modeled after, but is not identical to, section 4 of the Clayton Act."[45] Therefore, any variations between the language of section four of the Clayton Act and section 1964(c) of RICO are especially instructive.

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44 It would be a strained construction to say that any person by virtue of § 1964(c), which gives such a person only a right to damages, would also have a right to sue for permanent injunctive relief under subsection (a). *See supra* text at note 24. The differences between the private remedy sections in the Clayton Act and in RICO are particularly significant here. There are specific Clayton Act provisions giving the government and individuals the right to bring actions for injunctive relief, 15 U.S.C. §§ 25-26 (government, private persons), something which is not set forth in RICO § 1964 or evidently recognized by the *Cappetto* court when it speaks of the Clayton Act's § 4. 502 F.2d at 1357.

Moreover, section 1964(a) speaks of "jurisdiction to prevent and restrain violations of section 1962," on its face allowing injunctions *before* the violations have occurred or criminal prosecution commenced. Subsection (c), on the other hand, speaks of injury "by reason of a violation of section 1962," language which at least suggests that the violation must be proved criminally before the action commences.

45 Blakey & Gettings, *supra* note 6, at 1040. *See* House Hearings, *supra* note 9, at 543-44 (ABA report). *Cf.* Bridges, *supra* note 6, at 68-70.

The Clayton Act provision reads in relevant part: "any person who shall be injured in his business or property *by reason of anything forbidden* in the antitrust laws may sue . . . ." 15 U.S.C. § 15(a) (1982) (emphasis added). RICO section 1964(c), on the other hand, reads: "Any person injured in his business or property *by reason of a violation* of section 1962 of this chapter may sue . . ." (emphasis added). The difference is instructive. It is possible to argue that "violation" is simply a shorthand way of saying "by reason of anything forbidden," and one could suppose that when the House of Representatives reinserted the treble damage private right of action provision which had been rejected by the Senate it approved this change in a desire merely to eschew surplusage.[46] But this interpretation does not seem as compelling as one which suggests that the change was made with a specific intent in mind—to require that conviction at least of the predicate acts be had before a civil suit may be brought by a private person.[47]

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46 We are fully aware that the "by reason of a violation" language can be found in the earlier Senate and House bills which did contain private civil remedies. S. 1623, 91st Cong., 1st Sess., § 4(a) (1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967); H.R. 19586, H.R. 19215, 91st Cong., 2d Sess. (1970). *See supra* note 18 for a discussion of these bills. Nevertheless, the question remains why the House chose this language over the language of the Clayton Act.

47 We note in the post-legislative history that this conclusion was rejected by the American Law Division of the Library of Congress in its comparative study of RICO and the Clayton Act, *see* Victims of Crime, *supra* note 20, at 323, 329, on the basis that "violation" is used elsewhere in the antitrust laws, e.g., in 15 U.S.C. §§ 4, 25, 26. But two of the provisions cited in that study have their own parallels in RICO: 15 U.S.C. §§ 4 and 25 are equivalents of 18 U.S.C. § 1964(a) giving district courts jurisdiction to prevent and restrain violations at the behest of the government. And the other Clayton Act provision cited, 15 U.S.C. § 26, which has no parallel in RICO, gives similar jurisdiction at the behest of private parties, a matter which the American Law Division study sought explicitly to remedy as to RICO. Thus, the American Law Division statement does not meet the argument based

It is helpful to look back to the definition in section 1961(1) of "racketeering activity," since we are referred to section 1962 by way of section 1964(c), and section 1962(a) makes "a pattern of racketeering activity" "unlawful" in certain circumstances. Section 1961(1) describes four distinct types of such activity. Those under subparagraph (A) include "*any act or threat* involving murder, kidnaping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs, which is *chargeable* under State law" and is punishable by imprisonment for more than one year (emphasis added). The "racketeering activity" acts under subparagraph (B) include "*any act which is indictable* under" certain provisions of federal law including mail fraud and wire fraud, in addition to other typical organized crime activities (emphasis supplied). The predicate acts under section 1961(1)(C) are, as in subparagraph (B), "indictable" acts dealing with labor matters. Finally, the predicate acts under subparagraph (D) include "any *offense* involving fraud" in the securities or bankruptcy areas, or in the felonious dealing in narcotic or other dangerous drugs (emphasis supplied).

The difference between the "chargeable under state law" and "indictable under federal law" language can readily be explained by the fact that some matters even involving imprisonment for more than a year may be chargeable by information under state law, as in the State of Connecticut for example. The distinction between "indictable" acts under (B) and (C) or "chargeable" acts under (A), on the one hand, and "offense[s]" under subparagraph (D), on the other, is more troubling. An

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on the difference in language between the treble damage private action provisions which are otherwise parallel, 15 U.S.C. § 15 and 18 U.S.C. § 1964(c).

"offense" speaks to conviction. An indictable or chargeable act refers obviously to an earlier stage in the criminal process. All these terms, however, speak along criminal rather than civil lines.

A person who is charged in a civil case with securities fraud (for example, by way of willful misrepresentations in a proxy statement), proof of which is by a preponderance of the evidence, can surely not be said to have committed "an offense," conviction of which requires proof beyond a reasonable doubt, with all of the traditional constitutional and other safeguards. Criminal violation of the securities laws occurs only with the requisite criminal scienter. Is one to be held liable under a lesser standard of proof in a private right of civil action and, not incidentally, thereby stigmatized as a "racketeer"? It is hard to believe that in adopting civil RICO Congress intended to permit proof of "willful" violations by only a preponderance of the evidence.[48] Otherwise, two misstatements in a proxy solicitation could subject any director in any national corporation to "racketeering" charges and the threat of treble damages and attorneys' fees.

As for the language "any act which is indictable" (or "chargeable"), conceivably Congress meant by the choice of these words to suggest either that indictments or, in the case of certain state felonies informations, are not required, since the acts need only be "indict*able*" or "charge*able*" (emphasis added). But a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts power to determine whether

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48 The Securities and Exchange Act of 1934 makes only "willful" violations criminally punishable. Section 32(a), 15 U.S.C. § 78ff (1982). On "offense" under the securities laws in RICO, *see generally* Bridges, *supra* note 6, at 63-64.

an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts—proved by a preponderance of the evidence only—and say that these facts make out acts which are "indictable" or "chargeable." *See Kleiner v. First National Bank of Atlanta*, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981), *overruled on other grounds sub nom. Morosani v. First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983). In the case of indictments that is the purpose of grand juries. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." Surely, being declared a "racketeer" or being held responsible for being one is being held to "answer for" an "infamous crime."[49] Whatever else one

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49 The American Bar Association has recommended that the RICO statute be amended to replace the term "racketeering activity" with the phrase "criminal activity" as a way to resolve this problem. Report to the House of Delegates, 1982 ABA Sec. Crim. Just. Rep. 3-4 (Jan. 1982). *Cf. United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981) (prejudicial taint inevitably surrounds label of "racketeer").

As we have indicated in *supra* note 24, there are potential constitutional problems created by the broad reading of RICO endorsed by many courts. At some point defendants are entitled to the constitutional protections of the criminal law regardless of how the government chooses to characterize a given cause of action. *See Boyd v. United States*, 116 U.S. 616, 634-35 (1886). Relevant factors in characterizing an action as "criminal" are the nature of the underlying offense, the stigma attached to the charge made, *In re Gault*, 387 U.S. 1, 23-25 (1967), the nature of the punishment authorized by the statute, *Trop v. Dulles*, 356 U.S. 86, 94-95 (1958), the intent of Congress in promulgating the statute, *id.*, and whether the government or a private party is bringing the action. *See generally* Note, *infra* note 59, at 210-12. Reading private civil RICO suits not to require criminal convictions would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation "racketeer," authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law. Thus, the construction advanced in this opinion avoids serious constitutional questions.

may think of grand juries or the processes by which they pursue their deliberations, they may stand as a bulwark between the individual and the government. Under the interpretation given RICO by those courts which do not require criminal convictions of the predicate acts before the bringing of a civil action, every private plaintiff becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor.

2. *Intent.* But we need not rest the argument for this narrow interpretation of RICO on parsing of the words of the statute, since concededly they are ambiguous and could be construed to relate to underlying conduct. The structure of RICO as a whole leads one to the narrower interpretation requiring criminal convictions by a more direct route. The Act is designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal. Thus it has been noted by the very commentators who have most strenuously urged a broad reading of civil RICO that RICO did not itself "draw a line between criminal and innocent conduct," but rather "authorized the imposition of different criminal or civil remedies on conduct *already criminal*, when performed in a specified fashion." Blakey & Gettings, *supra* note 6, at 1032 (emphasis supplied).[50] In this sense RICO is significantly different from the antitrust laws, where it is possible to bring a civil action even in the absence of

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50 This structure is, of course, altered to some extent by the provision which allows the government to seek injunctive relief in the absence of criminal convictions. As we have indicated, however, injunctive relief to *prevent* violations is simply a very different kind of remedy than a treble damages action and is accordingly subject to a unique regimen. It would be contrary to the entire purpose of equitable remedies if their utilization had to await the imposition of criminal sanctions.

The argument made in text is nowhere answered by our dissenting brother.

criminal conduct.[51] RICO liability simply does not exist without criminal conduct,[52] though of course, in a criminal RICO case, the proof of the predicate act convictions may be made under the same indictment, in the same trial and coordinately with the proof of the RICO offense(s). But in a civil context, there is no way to know whether the conduct in question is "already criminal," a problem compounded by the fact that ordinarily there is a lower burden of proof in civil actions. We conclude that had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c). Absent such explicit congressional direction, such a narrow reading of section 1964(c) best integrates that subsection into the entire structure of the Act. On the other hand, if the broad reading is accepted, problems are created of which there is no indication that Congress even dreamed.

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51 [There is] a significant distinction between section 1964 and the antitrust laws . . . . [Sherman Act] civil actions may be brought in cases in which criminal prosecution would not have been justified . . . . Thus, a civil action may succeed . . . [even] if the government [does] not show that the violation constituted a *criminal* act.

. . . .

Thus, *the charge that a section 1964 action is "inherently criminal" is true.* (emphasis added) (footnote omitted).

Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192, 208-09 (1975). *See also* Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO,* Nat'l L. J., Oct. 10, 1983, at 21, col. 1.

52 *United States v. Campanale*, 518 F.2d 352, 365 n.36 (9th Cir. 1975) ("The acts constituting racketeering activity must themselves be criminal offenses."), *cert. denied sub nom. Mathews v. United States*, 423 U.S. 1050 (1976); *Salisbury v. Chapman*, 527 F. Supp. 577, 579 (N.D. Ill. 1981) ("RICO does not contain any substantive prohibitions unknown to other sections of federal criminal law. Instead, it confers upon victims of certain *criminal violations* the right to proceed in a civil suit against the offenders." (Emphasis added.))

Chief among these problems, as the foregoing argument suggests, is the proper burden of proof in proving predicate offenses in the absence of a criminal conviction. It is not surprising that courts which have allowed civil suits to go forward have wrestled with the proper burden of proof required to maintain the action. The problem, of course, relates to the burden to which a plaintiff must be put to prove that a defendant is a "racketeer" because he has committed two predicate acts. At least three different standards of proof are within the realm of plausibility: proof beyond a reasonable doubt,[53] proof by clear and convincing evidence,[54] and proof by preponderance of the evidence.[55] Courts in addition have indicated that probable cause must be alleged with reference to the predicate acts, although how this is meant to relate to the burden of the plaintiff at trial remains something of a mystery.[56]

Insofar as the RICO scheme calls for only criminal conduct to be punished, it thus appears that in the

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53 No court to date has held that the criminal burden is appropriate. The standard is mentioned in Matz, *supra* note 51. *See also* Note, *Enforcing Criminal Laws Through Civil Proceedings: Sec. 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 Tex. L. Rev. 1055, 1062 n.52 (1975) ("Where, as with section 1964, proof of a violation of the statute requires proof of the commission of a crime, the defendant should arguably receive the benefit of a traditional criminal trial.").

54 *Swanson v. Wabash, Inc.*, No. 83-C-0459 (N.D. Ill. Dec. 16, 1983) (suggesting appropriateness of clear and convincing standard, citing Matz, *supra* note 51, at 21, col. 1).

55 *Farmers Bank of Del. v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978); *Parnes*, 487 F. Supp. at 647 ("civil burden of proof"); *State Farm Fire & Cas. Co.*, 540 F. Supp. at 676 (citing *Farmers Bank*); *Heinhold Commodities*, 513 F. Supp. at 313 (*id.*); *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983).

56 *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682-83 (N.D. Ga. 1983); *Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042, 1045 (D. Utah 1983).

absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case in proving that criminal conduct. Yet it would be extraordinarily difficult for juries to understand the different burdens of proof required for different elements of a civil case. Moreover, if Congress had intended to impose such an unusual scheme, one would think that some suggestion of it would have occurred in the extensive legislative history. Instead, that history indicates that Congress assumed a preponderance standard was appropriate.[57] The most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit.

In addition to burden of proof problems, allowing private civil RICO claims to proceed without criminal convictions would make a hash of the very "liberal construction" provision said to require just such a result. It has been argued by the leading proponents of a broad reading of civil RICO that liberal construction is appropriate because RICO merely penalizes conduct already

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57 House Hearings, *supra* note 9, at 106-07, 664, 687. All of this discussion referred only to the government's private action. Nevertheless, some witnesses in the House hearings assumed that the "pattern of racketeering activity" element in a civil suit would have to be proved beyond a reasonable doubt. *See id.* at 328-29 (Report of the Association of the Bar of the City of New York).

Our dissenting brother does not directly confront the burden of proof problems except by apparently suggesting that a preponderance standard is sufficient (dissenting op., page 6), but that if it is not some heightened standard would be (dissenting op., pp. 7-8). Having in mind Congress's omission to examine this problem except very obliquely, as we point out in text, to attempt to draw a jury charge dealing with different burdens of proof is not only a very difficult task, likely to cause great confusion, but also not a little bit of the judicial legislation Judge Cardamone decries. And to accept the proposition that you can prove *criminal* acts, notes 50 *supra* and 58 *infra*, by a preponderance of the evidence raises its own problems of a higher magnitude, as we point out in text.

criminal; thus, it is said, requirements of strict construction have already been applied in construing the predicate criminal offenses.[58] Acknowledging that due process, of course, requires that criminal statutes be strictly construed, *e.g.*, *Dunn v. United States*, 442 U.S. 100, 112 (1979), these proponents argue that since proof of criminal conduct could already be presumed in RICO suits, there would then be no need to "*further* restrict the scope of the statute by *re*applying these policies." Blakey & Gettings, *supra* note 6, at 1032 (emphasis added).

In the civil context, absent predicate act convictions, the policy of strict construction simply cannot be implemented. As one commentator has suggested, "[i]f the liberal construction clause is applicable to determine the scope of criminal liability under Title IX, the provision is therefore unconstitutional." Tarlow, *RICO Revisited*, 17 Ga. L. Rev. 291, 309 (1983). How could the line be crossed into the sphere of criminality simply by bringing a civil action? It is this peculiar structure of RICO that strongly suggests that, had Congress considered the problem, it would have intended criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action. RICO's statutorily mandated requirement

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58 *See* Blakey & Gettings, *supra* note 6, at 1031-32:

> Congress believed that the normal practice of following a policy of strict construction . . . was inappropriate in the context of RICO, since *RICO did not draw a line between criminal and innocent conduct*. Instead, *RICO authorized the imposition of different criminal or civil remedies on conduct already criminal, when performed in a specified fashion*. Once the policies of strict construction or leniency had been implemented in the construction of the underlying "racketeering activity," *and the line had been crossed into the sphere of criminality*, it was *inappropriate to further restrict the scope of the statute by reapplying these policies*.

(Emphasis added) (footnote omitted). This point is simply not addressed by our dissenting brother. See note 50 *supra*.

of liberal construction cannot fairly be relied upon in interpreting section 1964(c) without undermining its very justification. Nor is this anomaly surprising given that private civil RICO was added to RICO in the House as an afterthought, subsequent to the inclusion of the liberal construction clause in the Senate version of the bill. The statute, we repeat, is simply not a symmetrical whole.

In sum, after reviewing the words and structure of the enacted statute, its legislative history, and the prior case law interpreting the statute, we find it impossible to believe that in enacting RICO, Congress intended to sweep all ordinary injuries occasioned by the predicate criminal acts within the dragnet of the treble damage remedy provided by section 1964. To bring a private civil action, there must be a "violation," that is, criminal convictions on the underlying predicate offenses. Of course, a conviction under RICO itself will do, a fortiori. Moreover, plaintiffs must satisfy the standing requirement set out in this opinion and by the court below, a requirement that, as a practical matter, will not create an added barrier to a plaintiff's suit following upon criminal convictions under RICO, though it may present a problem in the case of convictions only of predicate acts, a problem which we need not here address.

Neither should the criminal conviction requirement create a significant additional barrier to a RICO plaintiff with proper standing to sue. Even without such a requirement, if a criminal prosecution is possible, it is unlikely that private RICO actions can progress very far, since defendants will block discovery by invoking the Fifth Amendment. *See* Bridges, *supra* note 6, at 53 n.66.

We therefore reject arguments based on the supposed "plain meaning" of a statute that, whatever its virtues and vices, is hardly a model of clarity. Being required,

then, to look to the legislature's intent as demonstrated in the legislative history, we find nothing conclusive, but discern in the legislative silence a purpose that is entirely at odds with the open-ended reading of the statute adopted by a number of the courts and promoted by certain commentators. The legislative history indicates that the private action provision is modeled upon the Clayton Act, and we hold that standing requirements analogous but not identical to those in the Clayton Act should be required in RICO. We also note that the civil RICO provisions differ in some significant ways from the Clayton Act provisions.[59] In particular, the Clayton Act allows suits in the absence of criminal conduct, and therefore obviously in the absence of criminal convictions. Private civil RICO, on the other hand, is designed only to penalize conduct already determined to be criminal. In addition, the analysis of the RICO private treble damage provision must necessarily be differentiated from analysis of the injunctive provisions of RICO, both because of the differences between the government and a private party as a plaintiff, and because of the inherent differences between injunctive and punitive damages relief. Finally, we have tried to suggest that RICO's "liberal construction" clause actually requires that criminal convictions be obtained before civil suits under section 1964(c) commence.

We need not rest the argument on the burdens to which the courts would otherwise be subjected, though other things being equal that might carry weight. We do strongly suggest, however, that if Congress had intended

59 Proponents of a broad reading of the statute apply Clayton Act provisions by analogy when they suggest that since criminal convictions are not required there, they should not be required under RICO. At the same time they urge that the Clayton Act standing provisions should *not* be applied in interpreting RICO.

to permit defendants in every "garden-variety" fraud or securities violation case to be stigmatized as "racketeers," on the basis of a preponderance of the evidence, it would have said so in plainer language than it did. Before we impute to Congress the intention of federalizing a large portion of the common law which, since the time of the Constitution, has been left to the courts of the several states, and of providing treble damages and attorneys' fees for violations of these laws, or of altogether replacing or eliminating much of the need for extensive bodies of federal law specifically directed at extensively considered evils, we will require more explicit language from Congress indicative of such intent.

Judgment affirmed.

CARDAMONE, *Circuit Judge*, dissenting:

I disagree with the majority's conclusion that this Court should create a requirement of prior criminal conviction for the predicate acts forming the pattern of racketeering activity for all civil RICO claims. In so doing, the panel majority takes this Circuit far from the shores of principled and disciplined reasoning, and leads it unnecessarily into a sea of uncertainty. In the panel's view, Congress would have intended—had it thought about the implications of § 1964—that prior convictions be required. Not only does the majority turn the ordinary rules of statutory construction on their head by ignoring the plain meaning of the statutory language, but it also ignores the sound policy reasons for permitting civil RICO cases to proceed absent prior convictions for the predicate acts. In my view, the civil RICO provisions

mean just what they say. Because these and other considerations have convinced me that the majority has crossed the line and trespassed in an area exclusively reserved to Congress, I dissent.

I. *Prior Criminal Conviction Requirement*

Looking at the reasoning that creates a "prior predicate act criminal conviction" requirement one is struck that it—in Alice's words—gets "curiouser and curiouser." [1] No support for this proposition is found in the statute or its legislative history. Almost none of the decisions or the commentators argue for such drastic redrafting of the statute In fact, they support the opposite conclusion, *i.e.* that no prior conviction is necessary to bring a civil claim under RICO.

Along the way to reaching its novel conclusion, the panel misconstrues Congress' reasons for the enactment of this statute and makes a number of faulty assumptions. The panel majority's position seems bottomed on: (1) disapproval of cases that have taken a contrary view; (2) a view that Congress did not give civil courts power to decide when acts are "indictable" or "chargeable"; (3) a view that § 1964 would constitute an unconstitutional "quasi-criminal" statute were a prior criminal conviction for the predicate acts not required; (4) a fear that defendants will be "stigmatized" by a civil "conviction" for racketeering activity; and (5) analysis based on the word "violation" contained in § 1964. I propose to deal with each of these premises *seriatim*.

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[1] L. Carroll, *Alice's Adventures in Wonderland*, (Children's Classic ed.) 25.

(1) *Disapproval of Contrary Decisions*

The majority begins by analyzing those decisions that have refused to adopt a prior criminal conviction requirement, and disapproves of them because they supposedly are not well-reasoned. For example, *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) is dismissed almost without comment because "*Cappetto* made no holding with respect to private civil actions." Others are discarded because they merely cite to *Cappetto*. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982), which rejected a prior conviction requirement, and reasoned that Congress would have defined the § 1964 "violation" differently had it desired such a requirement, is labelled "misguided."

This panel's evaluation of *Cappetto* puts it at odds with other panels of this Circuit that have cited that decision with apparent approval in other respects. *See United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). *Cappetto* involved a government prosecuted civil RICO claim. Ordinarily more, not less, protection is expected for a defendant when the government is plaintiff. When the plaintiff is a private party, as here, the quick dismissal of *Cappetto* totally ignores the "private attorney general" rationale built into RICO.

Discarding the numerous decisions of other courts that have not raised the bar of a prior conviction requirement will not make them go away. Virtually every court that has directly addressed the issue has decided no prior conviction is required. *E.g.*, *State Farm Fire and Cas. Co. v. Estate of Caton*, 540 F.Supp. 673 (N.D.Ind. 1982)

(holding no prior conviction is required based on statutory interpretation); *Farmers Bank of State of Del. v. Bell Mtg. Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978) (§ 1964(c) "does not condition that cause of action in any way upon a criminal previous under the criminal provisions of the statute"). *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983) (Civil RICO action available "without any requirement of a prior criminal conviction for that conduct," citing *USACO, supra*). *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983) (overruling *Kleiner v. First Bank National Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981) without discussing prior criminal conviction dictum in *Kleiner*); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); (private RICO action need not be preceeded by criminal conviction). The majority's dismissal of these holdings as uninformed or as simply "following *Cappetto*" ignores the obviously simple explanation for their resounding rejection of any prior conviction requirement—it does not appear in the statute.

(2) *"Indictable" or "Chargeable" Acts*

Congress, the majority further tells us, did not intend to give civil courts power to determine whether an act is 'indictable' absent a properly returned indictment or 'chargeable' absent an information." How can this view be correct? To begin, the words themselves connote the contrary—*i.e.*, Congress did not use the phrase "for which an indictment or information has been *returned* or *filed*"; much less did it say "for which the defendant has been criminally *convicted*." More significantly, Congress clearly used the terms "indictable" or "chargeable" in

reference to "acts" forming a pattern of racketeering activity under § 1961, to which sanctions specifically labelled as "civil remedies" were then directed. To stretch this language into a requirement that a prior *conviction* must be obtained strains credulity. Had that been Congress' aim, § 1964's title would have been "Post Criminal Conviction Civil Remedies," not "Civil Remedies."

Further, the statute as Congress enacted it does not require civil courts to determine that the RICO predicate acts are in fact criminal acts. All that need be determined is that they are acts which, if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions. The use of criminal and civil sanctions for the same conduct is common. Congress has frequently enacted legislation giving private litigants civil remedies for acts which may also be punished criminally. In addition to the antitrust example, Congress has provided for multiple damages, statutory punitive damages, civil penalties and counsel fees in scores of statutes, including *inter alia*, the patent (35 U.S.C. § 281) and trademark laws (15 U.S.C. § 1117), the Truth in Lending Act (12 U.S.C. § 1640), the water pollution control statute (33 U.S.C. § 1321), the false claims statute (31 U.S.C. § 3729), the wiretap statute (18 U.S.C. § 2520), and the tax laws (26 U.S.C. 6653(b)). In some of these areas, Congress has gone further and accorded to the *government* a civil remedy for acts that are also punishable under federal criminal law. *Helvering v. Mitchell*, 303 U.S. 391 (1938) (after an acquittal for criminal tax fraud, the government obtained a 50 per centum penalty in a civil proceeding against the taxpayer and the court held this a civil, not criminal, sanction); *see One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (*per curiam*) (forfeiture proceeding, civil in nature, not barred

under Double Jeopardy Clause after defendant's acquittal on criminal charges). Rather than asking what kind of sanctions, *i.e.*, criminal or civil, are imposed against a defendant, the majority mistakenly focuses on the nature of the proceeding taken under § 1964. Here the sanction is treble damages. Treble damages have been part of our jurisprudence for centuries—since first appearing as a remedy for waste in the Statute of Gloucester (1278)—and they have never been viewed as "criminal" sanctions.

(3) *Constitutionality of § 1964 Absent Criminal Conviction*

As just noted, the majority analyzes a proceeding under § 1964 and implicitly finds it "quasi-criminal." It then seems to conclude that such finding necessitates holding the section unconstitutional were a prior criminal conviction not to be required. If true, this implicit conclusion is at odds with analagous case law in such areas as civil forfeitures, penalties and deportation cases which teaches that the correct procedure is for a court in a civil case to assure, on a selective basis, the existence of certain procedural safeguards, that would otherwise be applicable only in criminal cases. That is, only those criminal procedural remedies necessary to protect a defendant are required in the civil action. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886); *Lopez-Mendoza v. I.N.S.*, 705 F.2d 1059 (9th Cir. 1983) (*en banc*) (applicability of Fourth Amendment exclusionary rule in civil deportation proceeding), *cert. granted*, 52 U.S.L.W. 3509 (U.S. Jan. 9, 1984). *Bramble v. Richardson*, 498 F.2d 968, 973 (10th Cir.) (rejecting claim that *In re Winship*, 397 U.S. 358 (1970), requires proof beyond a reasonable doubt in a forfeiture proceeding), *cert. denied*, 419 U.S. 1069 (1974); *accord, United States v. Regan*, 232 U.S. 37 (1914)

(standard of proof in action for penalty for violation of Alien Immigration Act is preponderance of the evidence). *Cf. In re Ruffalo*, 390 U.S. 544, 552 (1968) (absence of fair notice of charges deprived petitioner of due process in disbarment proceeding). Close to 90 years ago the Supreme Court rejected the view that a civil forfeiture proceeding of the type involved in *Boyd v. United States, supra*, is a "criminal prosecution" in which the Sixth Amendment right of confrontation is implicated. *United States v. Zucker*, 161 U.S. 475, 482 (1896). Despite this teaching, the panel holds in effect that § 1964 is "criminal" for *all* purposes by requiring a prior criminal conviction before a civil RICO plaintiff can sue.

Thus, even accepting *arguendo* the view that § 1964 cannot be constitutionally applied in the absence of unspecified safeguards, the proper course is not to require a prior criminal conviction, but to insist on application of those safeguards (*e.g.*, the exclusionary rule, a heightened standard of proof or other criminal protections) within the context of a civil proceeding. The majority's response that imposing criminal safeguards in a civil case would confuse juries is not borne out in practice. Juries already apply heightened standards of proof to specific issues, in fraud, defamation, paternity and other types of civil actions. *See McCormick on Evidence* §§ 339-40 (2d ed. 1972) (citing cases).

Moreover, the Supreme Court has outlined the proper method of analysis for challenges to statutory civil remedies on the ground they are "quasi-criminal" or sufficiently "punitive" to require the procedural protections of a criminal trial. In *United States v. Ward*, 448 U.S. 242 (1980), the Court analyzed a challenge to section 311(b)(6) of the Federal Water Pollution Control Act (FWPCA) which permitted the government to assess a

civil penalty of up to $5000 for each violation of the FWPCA. To decide whether a statute is "civil" or "criminal" involves a two-step test: first, courts must examine whether Congress indicated a preference for one label or the other; second, where Congress has signalled a preference for a civil penalty, there must be further inquiry to determine whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention." *Id.* at 248-249. The Court concluded after considering the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), that the penalty in *Ward* was analagous to traditional civil damages and held it not sufficiently punitive to require Fifth Amendment criminal safeguards. *United States v. Ward*, *supra*, 448 U.S. at 251. Justice Blackmun's concurrence emphasized "that monetary assessments are traditionally a form of civil remedy" and found it significant that the FWPCA § 311(b)(6), like 18 U.S.C. § 1964, does not provide for "an affirmative disability or restraint" (such as imprisonment, deportation or disbarment). *Id.* at 257 (Blackmun, J.) (concurring).

More recently, in *United States v. One Assortment of 89 Firearms*, 52 U.S.L.W. 4228 (U.S. Feb. 22, 1984), the Supreme Court held that neither the Fifth Amendment double jeopardy clause nor collateral estoppel bars a forfeiture proceeding where the defendant in the prior criminal proceeding was acquitted. A unanimous Court applying the two-level *Ward* test indicated that even "discouraging unregulated commerce in firearms" and "removing [them] from circulation" are remedial, not punitive, purposes. *Id.* at 4231. The Court stressed that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," (*citing Helvering v. Mitchell*, *supra*) and held forefeiture to be a "separate civil sanction, remedial in nature." *Id.*

Applying the *Ward* test to § 1964 demonstrates that it is not a "quasi-criminal" statute even for purposes of Fifth Amendment guarantees, much less all criminal protections. The remedial purpose expressed in the statute is evident from its legislative history. Congress specifically provided that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, 84 Stat. 941 (1970) § 904(a). Section 1964 is designed to *compensate* private parties who are victims of tortious activity. *See United States v. Bornstein*, 423 U.S. 303, 314 (1975) (double damages under False Claims Act designed to ensure government is made completely whole); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (holding that double damages under False Claims Act are compensatory even if recovered by federal government). Its treble damage provision is therefore primarily remedial, and only partly punitive. The recovery in excess of actual damages constitutes statutory punitive damages designed in part to punish the defendant for tortious conduct, but traditionally allowable in civil proceedings without special criminal law safeguards. *See Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885) (multiple damages partly compensatory, partly punitive). Thus, § 1964 is "primarily remedial" under the Supreme Court's tests in *Helvering* and *Ward* because its principal purposes are to compensate victims of racketeering activity and to encourage them to vindicate their rights. In serving as private attorneys general, civil RICO plaintiffs aid in the eradication of such activity. In short, Congress' "civil" and "remedial" labels should not therefore be disregarded.

The majority apparently faced the dilemma of either upholding this statute as written or declaring it unconstitutional as punitive and hence quasi-criminal in nature. It

chose neither of these straightforward alternatives. It specifically rejected the former. And, since a statute as written may be held unconstitutional only if the challenger presents "the clearest proof" of it, *United States v. Ward*, *supra*, 448 U.S. at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)), and because such proof is absent here, it could not choose the latter. Instead, to resolve the problem, the majority inserts the prior criminal conviction requirement to avoid perceived "serious constitutional questions." The premise is flawed because this course of "avoidance" has actually created a constitutional question of even greater significance. Addition of this new requirement to civil RICO—one which Congress did not vote on and which the President did not endorse—has raised a question as to whether such judicial creativity is an unwarranted and unconstitutional intrusion into the legislative process.

(4) *Stigma*

The panel opinion stresses a fear that defendants will be "stigmatized" by their "indictment" at the hands of a "one-man grand jury" for racketeering activity. Yet, stigma alone ordinarily does not suffice to convert a proceeding from civil to criminal. *See Ullman v. United States*, 350 U.S. 422 (1956) (contempt conviction for refusing to testify before grand jury upheld following grant of immunity over claim defendant would be stigmatized by revealing past connection with the Communist party). One commentator observed that the holding of *In re Gault*, 387 U.S. 1 (1967), relied on by the majority, has been largely limited to sanctions threatening loss of liberty, and that stigma alone does not trigger the need for criminal safeguards. Note, *Organized Crime and*

The Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity," 124 U.Pa.L. Rev. 192, 214-15 (1975).

Further, the majority's sensitivity to the stigma that may attach to decent citizens named as defendants in civil RICO cases seems a bit overstated. Today, defendants in civil suits are labelled as violators of environmental laws when pumping coal by-products into the atmosphere, despoilers of our rivers when emptying oil from their tanker's bilges, adulterers in state divorce actions, and killers in vehicular wrongful death actions. The allegations of the civil complaint do not make these citizens criminals, although their conduct may well subject them to separate criminal prosecutions. Why the outcry over RICO? I, for one, believe the public is sophisticated enough to distinguish between a criminal conviction and a civil claim. To be named as a RICO defendant is not quite the Sword of Damocles that the majority would have it. Repeated often enough, it will either lose its effect as a settlement weapon or create enough public pressure to cause Congress to amend the statute. Again, it is not for this Court to alter the statute.

(5) *Use of Word "Violation"*

The opinion also places heavy reliance on Congress' use of the term "violation," and finds this word supports its thesis for a prior criminal conviction. In *Ward*, the statute also specifically referred to "violations" of the FWPCA. That Court notably attached no special significance to this term, presumably because the word "violation" is commonly used to designate civil wrongs.

Finally, the effect of this ruling will leave victims of those defendants whose activities were at the heart of Congress' concern without the remedy Congress envi-

sioned. Regardless of whether a defendant is a member of an organized crime family and no matter how lawless his pattern of racketeering activity may be, if he escapes conviction—through acquittal, a beneficial plea, or a decision not to prosecute—then the remedy granted the victim of these activities is lost.

II. *Racketeering Injury*

Concern that the RICO civil remedy will permit recovery of treble damages and attorneys' fees in every "garden variety" civil fraud case leads the majority to impose an additional standing requirement. Limiting RICO's broad reach by requiring, for example, an "organized crime" connection was rejected by Congress and by this court, *see Moss v. Morgan Stanley*, *supra*, 719 F.2d at 21 n. 17. Similarly, a "competitive injury" requirement has been rejected in the Seventh and Eighth Circuits. *Schacht v. Brown*, 711 F.2d 1343, 1359 (7th Cir.), *cert. denied*, 104 S.Ct. 508, 509 (1983). *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982), *aff'd in part on rehearing en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1983). The Supreme Court has specifically rejected an approach that would require an allegation that the enterprise be "illegitimate." *United States v. Turkette*, 452 U.S. 576, 586-87 (1981).[2]

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[2] I cannot agree with the majority's view that *Turkette* and other Supreme Court cases in the criminal area have no application to the issues raised on this appeal. In the first place, *Turkette* itself specifically refers to the civil provisions, noting that they "could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal." *Id.* at 585. Further, the majority's concerns over "federalization" of the common law of fraud are identical to the concern in *Turkette* regarding the balance between federal and state enforcement of criminal law, which the Supreme Court noted was considered specifically by Congress, and which provided no basis for courts "to restrict the application of the statute." *Id.* at 587.

What remains is the theory adopted by some courts and that, together with the prior conviction requirement, the majority embraces here. That is, there must be an allegation of an injury from the "racketeering enterprise," a so-called "racketeering injury." Such has also been described as an injury "by reason of conduct the RICO act was designed to prevent," and as "something more than" the injury caused by the predicate acts alone. How one can distinguish between the injury caused by the predicate acts and the injury done by the enterprise is not explained. My colleagues state that "only when injury caused by this *kind of harm* can be shown" (emphasis added) does a plaintiff have standing under § 1964. "This kind of harm," in turn, occurs when "mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors." This formulation is no more than a euphemism for an "organized crime" nexus requirement that should not be adopted by this Court after its rejection by the lawmakers. Other courts, the statute's congressional sponsors and commentators do not assign to civil RICO a scope on such a lilliputian scale.

In *Schacht v. Brown*, *supra*, the Seventh Circuit evaluated a similar standing requirement and stated that one trouble with "judicial pruning of RICO's civil provisions . . . where business fraud is alleged [is that] . . . there is simply no legitimate principled criterion" that accomplishes the distinction between ordinary "garden variety" fraud and fraud by an organized crime syndicate. *Schacht*, 711 F.2d at 1356. The *Schacht* court concluded that since the organized crime limitation on civil RICO had been rejected, it did not want it "revived under the

guise of determining the kinds of activity covered by RICO." *Id. See Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) (racketeering enterprise injury "undefined"). *Accord*, Note, *Civil RICO and "Garden Variety" Fraud—A Suggested Analysis*, 58 St. John's L. Rev. 93, 107-08 (1983). *See also Bennett v. Berg*, *supra*, 685 F.2d at 1059 (rejecting "racketeering injury" requirement which is just another way of arguing that no "enterprise" existed). *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D.Cal. 1983) (racketeering enterprise injury "little more than indirect statements" of requirement of "a 'nexus to organized crime' "). *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1353 (E.D.Pa. 1983) (cases do not make clear "what that 'something more' would be"); *Windsor Associates, Inc. v. Greenfield*, 564 F. Supp. 273, 279 (D.Md. 1983) (racketeering enterprise injury "analytically indistinguishable" from organized crime requirement).

Again, the majority's reliance on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), is misplaced for two reasons. First, Congress, at the suggestion of the ABA Antitrust section, indicated an intent *not* to incorporate technical antitrust standing and proximate cause notions into § 1964. *See* 115 Cong. Rec. at 6995 (1969) (discussing private civil actions). Second, in *Brunswick*, the Court found no clear expression of Congressional purpose to allow suits for "losses which are of no concern to the antitrust laws." *Brunswick*, 429 U.S. at 487. Fraud, however, was one of Congress' specifically targeted activities in enacting RICO, and plaintiff has alleged injury from fraudulent conduct. Whatever *Brunswick's* contours may be, its holding has no application where injury from two acts of mail or wire fraud is alleged, since such injury *is* of the type RICO was

"intended to prevent and that flows from that which makes defendants' acts unlawful," *id.* at 489.

To cast a net sufficiently wide to catch organized criminals, Congress took the calculated risk that others, whose activities are chargeable as crimes under other federal or state laws, would also be netted. Courts should not "creat[e] standing requirements that would preclude liability in many situations in which legislative intent would compel it." Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120-21 (1982). *See Moss v. Morgan Stanley, Inc.*, *supra*, 719 F.2d at 21. As with the majority's prior conviction requirement, the danger is that the racketeering injury standing requirement might well exclude plaintiffs in other cases where defendant's conduct "would be near the heart of Congress' concern." *Mauriber v. Shearson/American Exp., Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983).

Finally, despite the majority's thesis that the House of Representatives was unaware of the consequences of civil RICO, Congressman Poff, its sponsor, stated:

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344. Senator McClellan further noted that RICO "will have some application to individuals who are not themselves members of LaCosa Nostra

or otherwise engaged in organized crime." 116 Cong. Rec. at 18,945 (1970). Congress recognized the possibility of enacting a statute aimed only at "mobsters" or organized crime members and *consciously* chose not to do so. The majority simply rewrites the statute in a manner Congress rejected under the guise of restricting § 1964 to "mobster" activity. Congress chose means to achieve its ends that imposed a risk of RICO liability on those like appellee Imrex in this case. The allegations alleging wire and mail fraud against defendant Imrex—assumed on a motion to dismiss to be true—are indictable offenses. Fraud is a typical activity of organized crime and Congress specifically noted it in its statement of findings and purpose. Pub. L. No. 91-452, § 1. 84 Stat. 941 (1970). The legislative branch fully considered the possibility of vexatious litigation and took that risk advisedly. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970). Moreover, since the lawmakers explicitly provided in § 1964(c) for a private right of action, quite distinct from one judicially inferred, the judiciary's duty is to administer the law Congress passed and to defer its views on the policy considerations to the legislature. Note, *Civil RICO*, *supra*, 95 Harv. L. Rev. at 1117. Judicial creativity can only lead to inconsistency and confusion in the application of civil RICO. Whatever limitation is made should come not from the courts, but from Congress.

Accordingly, I vote to reverse the order appealed from and would reinstate the complaint.

Opinion of the Second Circuit in *Furman v. Cirrito*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1261—August Term, 1983

Argued: May 16, 1984 Decided: July 27, 1984

Docket No. 84-7113

AARON J. FURMAN, ALVIN KATZ, FRANCIS P. MAGLIO, MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM, ROBERT C. STAMM,

Plaintiffs,

MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM, ROBERT C. STAMM,

Plaintiffs-Appellants,

—against—

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK, A.J. YORKE,

Defendants-Appellees.

Before:

CARDAMONE, PRATT, and Hon. DANIEL M. FRIEDMAN, of the United States Court of Appeals for the Federal Circuit, sitting by designation, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Cooper, *J.*, dismissing plaintiffs' civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982), for failure to allege a "separate, distinct racketeering enterprise injury".

Affirmed on the authority of *Sedima, S.P.R.L. v. Imrex Co.*, No. 83-7965, slip op. at ____ (2d Cir. ____, 1984), and *Bankers Trust Co. v. Rhoades*, No. 83-7636, slip op. at ____ (2d Cir. ____, 1984).

SEYMOUR SHAINSWIT, New York, NY (Melanie L. Golden, Kronish, Lieb, Shainswit, Weiner & Hellman, New York, NY, of Counsel), *for Plaintiffs-Appellants*.

MAX GITTER, New York, NY (William P. Farley, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, of Counsel), *for Defendants-Appellees*.

PRATT, *Circuit Judge*:

The main issue on this appeal is one of considerable importance in view of the rapidly growing number of civil actions based on 18 U.S.C. § 1964(c), commonly known as "civil RICO". That issue is whether a plaintiff, in order to state a claim under § 1964(c), must allege a "separate, distinct racketeering enterprise injury", above and beyond the injury caused by the predicate acts of racketeering activity. Noting that the damage allegations in plaintiffs' RICO cause of action were identical to those in their common law fraud claims, the district court concluded that no "separate, distinct racketeering enterprise injury" had been alleged, that the RICO claim was therefore legally deficient, and, there being no other basis for federal jurisdiction, that the complaint should be dismissed. Although this panel concludes that neither the language of the statute nor its legislative history imposes such a requirement, we are compelled to affirm the district court's judgment based on the two recently filed, controlling opinions in this court: *Sedima, S.P.R.L. v. Imrex Co.*, No. 83-7965, slip op. at ____ (2d Cir. ____, 1984), and *Bankers Trust Co. v. Rhoades*, No. 83-7636, slip op. at ____ (2d Cir.____, 1984). Both of these cases were argued before the case now before us. The filings of the opinions in all three cases were held up pending a vote by the entire court on a request made within the court for in banc consideration of all three cases. When the in banc request was denied, the opinions were filed, by agreement of the court, in the order in which they were completed. We publish this opinion to express our disagreement with the majority views of the panels in those two cases and to reaffirm the views expressed by Judge Cardamone in his dissents in *Sedima, S.P.R.L.*, and *Bankers Trust Co.* This opinion will also serve as a record of the dissents by

Judge Cardamone and Judge Pratt to this circuit's denial of in banc consideration to *Sedima, S.P.R.L.*, *Bankers Trust Co.*, and the instant case. Without necessarily accepting the rationale of this opinion, Judge Winter also dissents from the denial of in banc consideration.

BACKGROUND

This lawsuit arises out of the sale of the brokerage firm of Bruns, Nordeman, Rea & Co. ("Bruns") to Bache, Halsey, Stewart, Shields, Inc. ("Bache"). Plaintiffs and defendants were all general partners of Bruns. Defendants Rea and Coleman were the managing directors of Bruns; the other defendants, along with Rea and Coleman, comprised the executive committee which formulated Bruns's policies, exercised exclusive control over its affairs, and negotiated the sale to Bache.

Plaintiffs allege that until it was too late in the sale negotiations to help them, defendants did not reveal that Bache had refused to complete the sale unless each partner of Bruns, including the plaintiffs, signed the purchase agreement; that defendants Rea and Coleman made payments, in the form of severance pay, to the other members of the executive committee in order to induce certain misrepresentations to plaintiffs; that defendants negotiated for themselves "sweetheart" employment arrangements with Bache, simultaneously misrepresenting to plaintiffs that these arrangements could not be altered; and that defendants made no effort to explore the merits of another offer to buy Bruns.

The complaint sets forth three causes of action, two of which are pendent state law claims based on common law fraud and breach of fiduciary duty. The civil RICO claim asserts that Bruns constituted an "enterprise" under 18

U.S.C. § 1961(4); that by virtue of their positions defendants "conducted and participated in the affairs" of Bruns within the meaning of § 1962(c); that defendants engaged in a fraudulent scheme of misrepresentations and concealments during their negotiations with Bache; that defendants conducted Bruns's affairs through "a pattern of racketeering activity", as that term is used in § 1962(c); and that, as part of the pattern of racketeering activity and in furtherance of the fraudulent scheme, defendants committed the predicate acts of using mail and wire facilities in violation of 18 U.S.C. §§ 1341 and 1343.

Plaintiffs allege "injury in their business and property" in that (1) had they been aware from the beginning that their consent was necessary to consummate the sale to Bache, they would have been able to bargain for and receive sums comparable to those received by members of the executive committee from Rea and Coleman; (2) these payments caused the committee members receiving them to refrain from seeking a higher price from an alternate purchaser; (3) had defendants negotiated in good faith on behalf of all the partners, instead of just themselves, each plaintiff could have obtained employment arrangements superior to those that they actually received; and (4) the consideration Bache paid to the partnership was substantially reduced, because Bache absorbed the cost of funding the lucrative employment arrangements negotiated by defendants for themselves. Plaintiffs seek the treble damages and attorney's fees authorized by 18 U.S.C. § 1964(c).

Defendants moved in the district court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Alternatively, they sought an order compelling plaintiffs to arbitrate the controversy as provided in the partnership

agreement. The district court rejected most of defendants' arguments: it concluded that, on the allegations of the complaint, Bruns was an "enterprise", that the sale to Bache was part of the "affairs" of the enterprise, and that defendants had engaged in a "pattern of racketeering activity", all within the meaning of those terms in the RICO statute. However, on the sole ground that plaintiffs were required, but failed, to allege "a separate, distinct racketeering enterprise injury", the district court dismissed the complaint. It did not reach the arbitration question.

On appeal, therefore, we are presented with the narrow issue of whether, in order to state a claim under § 1964(c), a plaintiff must allege "a separate, distinct racketeering enterprise injury". We are *not* considering whether plaintiffs must allege a connection to organized crime, *cf. Moss v. Morgan Stanley*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1280 (1984), whether plaintiffs must show some "competitive injury" as a result of defendants' actions, *cf. Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 508 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd in part and rev'd in part on other grounds*, 710 F.2d 1361 (en banc), *cert. denied*, 104 S.Ct. 527 (1983), or whether the statute requires a criminal conviction of the predicate offenses, or of a RICO offense, before a civil RICO claim can be maintained, *see Sedima, S.P.R.L. v. Imrex Co.*, slip op. at ____; *cf. USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982); *Farmers Bank of Delaware v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

DISCUSSION

In 1970 congress enacted the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 941. Title IX thereof, codified at 18 U.S.C. §§ 1961-68, is entitled "Racketeer Influenced and Corrupt Organization Act" (RICO) and prescribes criminal penalties, 18 U.S.C. § 1963, as well as civil remedies, 18 U.S.C. § 1964, for violation of its substantive provisions, 18 U.S.C. § 1962. The case before us concerns the private civil remedies under § 1964(c), particularly treble damages and attorney's fees.

Our analysis must begin with the statutory language. *Lewis v. United States*, 445 U.S. 55, 60 (1980). If unambiguous that language controls, absent "clearly expressed legislative intent to the contrary". *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). Further, in construing this statute we should keep in mind that congress intended that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970); *see also United States v. Turkette*, 452 U.S. at 587.

RICO's private civil remedies are authorized by § 1964(c), which provides:

> Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover three fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962(c), the substantive provision that plaintiffs claim was violated here, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Congress has carefully defined for us some of the unfamiliar terms it used:

> "[E]nterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. § 1961(4).
>
> "[R]acketeering activity" means [any of a large number of specified acts which are chargeable under state law, indictable under federal law, or constitute an offense under federal bankruptcy, securities, or drug laws]. § 1961(1).
>
> "[P]attern of racketeering activity" requires at least two acts of racketeering activity [within a ten year period]. § 1961(5).

When these provisions and definitions are applied to the instant complaint, it is apparent that plaintiffs have sufficiently alleged those facts required by the statutory language—that they were injured in their business and property by the conduct of the defendants, who violated § 1962 by conducting the enterprise's affairs through a pattern of racketeering activity. The alleged pattern of racketeering activity was a repeated use of the mails and the wires in furtherance of defendants' underlying scheme to defraud plaintiffs by concealing from them until the

last possible moment the true conditions for the sale of Bruns.

The court below, however, construed the phrase "by reason of a violation of § 1962", contained in § 1964(c), as requiring plaintiffs to allege "something more" than injury from defendants' predicate acts of mail and wire fraud. The "something more" was characterized as a "separate, distinct racketeering enterprise injury". The two recent decisions by panels of this court referred to at the beginning of this opinion address this same issue and essentially agree with the district court in this case. In *Sedima, S.P.R.L. v. Imrex Co.*, a divided panel of this court held that, in order to state a civil RICO claim, a plaintiff must allege a "racketeering injury" which it defined as including an "injury different in kind from that occurring as a result of the predicate acts themselves". Slip op. at ____. The panel identified such an injury as one "caused by an activity which RICO was designed to deter." *Id.* More specifically, it held that this type of injury occurs only where "mobsters", either through legitimate or illegitimate businesses, "cause systemic harm to competition and the market, and thereby injure investors and competitors." Slip op. at ____.

In *Bankers Trust Co. v. Rhoades*, another divided panel of this court held that a civil RICO claim requires an allegation of some kind of "proprietary injury" caused by defendant's use of a pattern of racketeering activity in connection with a RICO enterprise, as opposed to an injury caused merely by the individual racketeering acts. The panel concluded that, without an allegation of this "distinct RICO injury", a civil RICO complaint is legally insufficient. Slip op. at ____. In addition to this circuit's recent decisions, some district courts have imposed a similar restriction on civil RICO, sometimes in the form

of a "standing" requirement, *e.g.*, *Dakis on behalf of the Dakis Pension Plan v. Chapman*, 574 F. Supp. 757, 761 (N.D. Cal. 1983); *Barker v. Underwriters at Lloyd's London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Johnsen v. Rogers*, 551 F. Supp. 281, 284-85 (C.D. Cal. 1982); *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Alton v. Alton*, No. 82 Civ. 0795, slip. op. at 5-6 (S.D.N.Y. July 9, 1982), *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981), but other district courts have rejected such a restriction, *see*, *e.g.*, *Wilcox v. Ho-Wing Sit*, No. C-84-0615-WWS, slip op. at 17-18 (N.D. Cal. May 3, 1984); *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Windsor Associates, Inc. v. Greenfeld*, 564 F. Supp. 273, 278-79 (D. Md. 1983).

To us, the language of § 1964(c) is clear. It contains no requirement for a "racketeering enterprise injury"; nor does it limit the protected injury to one sustained "by reason of" the racketeering enterprise; it grants civil relief for "injury", which logically includes *any* injury, "by reason of a violation of § 1962".

Despite the clarity of congress's language, defendants argue that, since RICO's primary purpose is to eradicate organized crime, it is directed only against "racketeers" such as hoodlums and thugs, and not against businessmen engaged in "garden variety fraud", as alleged in this case. However, defendants and others who advocate this position ignore the larger purposes of RICO. While RICO's

primary focus may have been on organized crime, when considering the statute congress also recognized that fraud is a pervasive problem throughout our society, *see* Statement of Findings and Purpose, Organized Crime Control Act of 1970, 84 Stat. 922-23 (1970); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 245-48 (1982), which causes billions of dollars in economic loss each year. *Id.* at 342-48. Congress further acknowledged that existing state and federal law was not capable of dealing with this problem. *United States v. Turkette*, 452 U.S. at 586.

Thus, in order to deter and help eliminate fraud from interstate commerce, congress included in its § 1961(1) definition of predicate acts of racketeering activity not only criminal activity which had formerly been "within the police power of the State", thereby essentially federalizing certain specific state crimes, *id.* at 586-87 (citing legislative history), but also the common federal crimes of fraud, such as mail fraud, wire fraud, bankruptcy fraud and securities fraud. Congress was well aware that in so doing, it was altering the federal-state balance in these areas, elevating "garden variety" common law fraud claims to the status of federal offenses, and subjecting violators to enhanced criminal penalties and severe civil remedies. *Id.* Since congress unquestionably had the power to do this, "the courts are without authority to restrict the application of the statute." *Id.* at 587 (citation omitted). Yet, restriction is precisely what some courts, like defendants and the court below, seek to impose through an artificial standing requirement on plaintiffs who seek relief under § 1964(c).

Further, the statute is not aimed at "racketeers"; indeed, the word "racketeer" is not used in the statute

except in its title. Instead, it is aimed at "racketeering", and even then only in the context of "racketeering activity", which congress has defined carefully and precisely in terms of conduct. When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity", it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud", we can only conclude that by the RICO statute congress has provided an additional means to weed that "garden" of its fraud.

It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. As we view RICO, fraud by anyone, when furthered by multiple use of the mails, constitutes a "pattern of racketeering activity". And when that pattern is used to conduct the affairs of an "enterprise", congress intended to provide the victims with the private civil RICO remedies of treble damages and attorney's fees for all injuries caused by the defendant's conduct.

By construing the "by reason of" language to require more than injury resulting from the predicate acts, courts simply assume that congress could not have intended to provide treble damages and attorney's fees to persons "whose only injury stems directly from the predicate acts." *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1007; *see also Johnsen v. Rogers*, 551 F. Supp. at 285; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. at 208-09. As a practical matter, however, the only injury suffered by an injured party in most cases will flow from the predicate acts; the enterprise is merely the means or vehicle through

which those acts are accomplished. To require injury to result from "something more" than the predicate acts is to sterilize civil RICO as a weapon against the conduct congress sought to curtail.

Moreover, it is not true that absent a "racketeering enterprise injury" a claim under § 1964 represents no more than a claim brought under the statutes which define the predicate acts. *United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977); *cf. Johnsen v. Rogers*, 551 F. Supp. at 285; *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980); *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1007-08. What distinguishes a civil RICO claim from an ordinary fraud claim is that RICO requires a "pattern of racketeering activity" (two acts within 10 years) used to conduct the affairs of an "enterprise." *See United States v. Forsythe, supra*. The existence of the "enterprise" is a *sine qua non* of a RICO claim, and "at all times remains a separate element which must be proved", *United States v. Turkette*, 452 U.S. at 583. By requiring "proof of a fact other than the facts required to prove the predicate acts of racketeering", *Bennett v. Berg*, 685 F.2d at 1060, RICO transforms conduct that is already criminal under other statutes into a federal RICO crime with its severe maximum penalties of 20 years in prison and a $25,000 fine. Similarly, with equal force, and for the same deterrent purpose, the statute transforms ordinary common law fraud claims into federal civil RICO claims, with enhanced remedies of treble damages and attorneys fees.

Those district courts, like the one below, which have dismissed complaints for failure to allege a separate and distinct "racketeering enterprise injury", have not provided guidance as to what constitutes such an injury. *See Ralston v. Capper*, 569 F. Supp. at 1580. One court has

posited that a "racketeering enterprise injury" might occur "if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise." *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. at 209. But this example does little to define a "racketeering enterprise injury", and it does even less in terms of limiting the statute's reach, because almost every defendant's ability to inflict harm on a plaintiff would be enhanced by the fruits of the racketeering activity. It follows then that almost every complaint that alleges a § 1962 violation and a concomitant injury would satisfy this test. The difficulty in understanding or even defining a "racketeering enterprise injury" is more fully demonstrated in Part III of Judge Cardamone's dissenting opinion in *Bankers Trust Co. v. Rhoades*, slip op. at ____.

Defendants and others have decried the use of RICO in "far-reaching civil contexts" where it has the potential to "tarnish the reputations" of ostensibly legitimate businesspersons. We are unmoved by the argument. By defining "racketeering activity" in functional rather than status terms, congress sought to avoid serious constitutional hazards. If defendants are surprised or offended that their "garden variety" fraudulent conduct is now statutorily characterized as "racketeering", they should address their grievance to congress, which clearly and specifically included mail, wire, and securities frauds as predicate acts of "racketeering activity" under § 1961(1). *See also* Blakey, *supra*, at 268-70. Since such conduct is more frequently associated with "white collar" crime than with "organized crime", as those terms are generally used in the everyday world, we conclude that congress wanted

RICO to reach, among other illegal conduct, precisely those kinds of activities that are at issue in this case.

The legislative history of Title IX does not support a contrary interpretation of the statute. When it enacted RICO, congress was on notice that the statute had potentially far-ranging effects. Some members of the house who opposed the statute argued:

> Title IX * * * seeks to stymie organized crime's growing infiltration of legitimate business.
>
> But it runs amuck. It embodies poor draftsmanship, and it employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse.

H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News, 4007, 4081 (dissenting views of Reps. Conyers, Mikva, and Ryan); *see also* 116 Cong. Rec. 35204-05 (1970) (remarks of Rep. Mikva). Despite this opposition, however, congress chose to enact the statute as written, and we would exceed our proper function were we to rewrite its provisions in order to restrict its application. *United States v. Turkette*, 452 U.S. at 587.

A few courts have seized upon references to antitrust law in RICO's legislative history, specifically to § 4 of the Clayton Act, 15 U.S.C. § 15, which contains language similar to that in § 1964(c), as evidence that congress, in enacting RICO, intended to impose proof requirements on RICO plaintiffs similar to those imposed on antitrust plaintiffs. *See Johnsen v. Rogers*, 551 F. Supp. at 285; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. at 208-09. While RICO's legislative history does contain some references to antitrust principles, attempts to impute the restrictive stand-

ing requirements of antitrust law to RICO, based on similar language in both statutes, are flawed.

Section 4 of the Clayton Act, 15 U.S.C. § 15, enables a person "injured in his business or property by reason of anything forbidden in the antitrust laws [to recover treble damages] and the cost of suit, including a reasonable attorney's fee." To recover under this provision, "antitrust injury" must be proved, which is "injury of the type antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1971).

Relying on this language in *Brunswick*, some courts have required that a plaintiff demonstrate a distinct RICO injury in order to state a civil RICO claim. *See Johnsen v. Rogers*, 551 F. Supp. at 285 (plaintiff must allege "a commercial injury caused by the conducting of an 'enterprise's affairs through a pattern of racketeering activity.' "); *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. at 1007 (plaintiff must allege "injury of the type the RICO statute was intended to prevent"); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. at 208. (although RICO does not require a competitive injury as that term is defined by antitrust cases, plaintiff must allege a "racketeering enterprise injury").

But the antitrust analogy has several defects. While RICO copied the treble damages and attorney's fee language of § 4, this was simply "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff); *see also* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1112 (1982). Moreover, these concepts that were

borrowed from the Clayton Act, treble damages and injunctive relief, pertain to remedies rather than what is necessary to establish a claim under RICO.

Senator McClellan, one of the sponsors of the bill, stated:

> There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.
>
> The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill.

115 Cong. Rec. 9567 (1969).

Senator Hruska echoed these remarks:

> Patterned closely after the Sherman Act, [RICO] provides for private treble damage suits, prospective injunctive relief, discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.

115 Cong. Rec. 6993 (1969).

Moreover, the Antitrust Section of the American Bar Association argued against a proposal which would have amended the Sherman Act to provide for civil RICO remedies, and instead recommended the enactment of separate statutes, contending that the use of antitrust laws to combat organized crime

> could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime

> who might seek treble damage recovery. Such a private litigant would have to contend with the body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."

115 Cong. Rec. 6995 (1969).

This recommendation, adopted by congress, recognized that the application of antitrust commercial injury standing requirements would not be appropriate in the RICO context. *Kimmel v. Peterson*, 565 F. Supp. at 494.

Antitrust law has very little relevance to RICO, as each area of law serves different purposes. "Congress did not see the objectives of RICO and antitrust laws as coterminous." *Bennett v. Berg*, 685 F.2d at 1059. Antitrust regulation is designed to promote market place competition and is increasingly focused on market efficiency rather than harm suffered by individual businesses. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977); *Schacht v. Brown*, 711 F.2d at 1358; *Ralston v. Capper*, 569 F. Supp. at 1580. RICO, on the other hand, is not concerned with either market efficiency or promoting competition, but instead is designed to inflict severe financial injury on those who commit crimes in operating an enterprise or who use an enterprise to insulate themselves from less severe penalties. *See* 115 Cong. Rec. 9567 (remarks of Sen. McClellan); Note, *supra*, at 1112-14.

As Judge Posner of the Seventh Circuit has noted, "analogies to Section 4 of the Clayton Act are forced", *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir.), *cert. denied*, 103 S.Ct. 177 (1982). Still another court has observed:

> [RICO] is designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have [sic] no applicability here.

Ralston v. Capper, 569 F. Supp. at 1580 (citation omitted).

Standing in antitrust cases has been strictly limited in order to confine treble damages to extreme situations and to avoid ruining violators and reducing market place competition. However, because RICO's essential aim is to strip violators of "the fruits of [their] ill-gotten gains", *United States v. Turkette*, 452 U.S. at 585; *see also* 115 Cong. Rec. 602 (1970) (remarks of Sen. Hurska), such concerns are not present under RICO.

In short, a limitation of RICO standing to those who suffer a "racketeering enterprise injury", whether based on similar language in antitrust laws, analogous antitrust concepts, or merely a judicial desire to restrict the statute's scope, not only would run counter to the intent expressed by congress when it enacted RICO, but also would "lead to the anamolous result of denying standing to direct victims of racketeering activity." *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. at 1157. As Judge Duffy of the Southern District of New York has pointed out:

> A brokerage enterprise infiltrated by organized crime and engaged in defrauding its customers * * * might injure no one but the customers of the enterprise. There would be no injury above and beyond that caused by the predicate acts of fraud forming the 'pattern of racketeering activity.' Such conduct, however, would violate RICO and would lie near the

> center of Congress' concern. In addition, § 1964(c) simply provides that 'any person * * * injured by reason of a violation of § 1962' may invoke RICO's civil remedies. I can imagine no construction of those words which would exclude from their coverage the primary victims of such a scheme and which would render such defendants immune from civil sanctions.

Mauriber v. Shearson/American Express, Inc., 567 F. Supp. at 1240.

While it may appear that congress, by enacting RICO, has "created a runaway treble damage bonanza for the already excessively litigious", *Schacht v. Brown*, 711 F.2d at 1361, congress has also spoken in clear and unambiguous terms. Although RICO is a complex statute, we find it to have been carefully drafted, and congress knowingly adopted provisions of potentially far-reaching application. Efforts by various courts across the country to restrict the statute's application seem to be based more on "judicial discomfort with the broad sweep of RICO", *Kimmel v. Peterson*, 565 F. Supp. at 493 n.21, than on a close reading of the statute's language or an accurate study of its legislative history. We think that any restriction of RICO along the lines urged by defendants must come from congress, not the judiciary. It is not our proper role to superimpose additional requirements for establishing a RICO claim on what is a clearly delineated statutory cause of action. As the Seventh Circuit concluded in *Schacht*:

> The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating or-

ganized crime. *United States v. Turkette*, 452 U.S. at 586-87, 101 S.Ct. at 2530-31 (1981).

711 F.2d at 1361.

We therefore think that the district court erred when it dismissed plaintiffs' complaint for failing to allege a "separate, distinct racketeering enterprise injury".

As an alternative ground for dismissal, defendants below moved to compel arbitration of plaintiffs' claims, based on an arbitration clause in the partnership agreement. Although the district court did not rule on that part of defendants' motion, plaintiffs now urge us to hold that their civil RICO claims are not subject to arbitration. Since we are compelled to uphold the dismissal of plaintiffs' complaint, we do not have to reach this issue.

CONCLUSION

The judgment of the district court is affirmed on the authority of *Sedima, S.P.R.L. v. Imrex Co.* and *Bankers Trust v. Rhoades*.

Relevant Statutory Provisions

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud

connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State of political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigation" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accom-

plices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalites

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection

with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Other Relevant Provisions of the Organized Crime Control Act of 1970

Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the

Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

[Liberal Construction; Effect on Other Laws]

Sec. 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order of process by any person.

List of Parent, Subsidiaries and Affiliates of Petitioner Bankers Trust Company

Bankers Trust Company is a subsidiary of Bankers Trust New York Corporation.

Subsidiaries of Bankers Trust New York Corporation

- Bankers Trust Company
- BT Bancshares, Inc.
  - Bankers Trust Company of Albany, N.A.
  - BT Commercial Corporation
- Bankers Trust Company of Florida, N.A.
- BT Advisors, Inc.
- BT Credit Co., Inc.
- BT Investment Managers, Inc.
- BT Leasing Corp.
- BT Leasing Services, Inc.
- Coleman Factors Corporation
- BT Southwest, Inc.
- BT Capital Corporation
- BT Futures Corp.
- BT Futures (Singapore) Ltd.
- BT Overseas Finance (Delaware), Inc.
  - Bankers Trust Overseas Finance N.V.
  - Bankers Trust International Capital N.V.
- Lourmel Investors (Delaware), Inc.
  - Lourmel Investors, Inc. (incorporated in Virginia)
- BT International Trading Corporation
- Sackman-Gilliland Corporation
  - BMI Properties, Inc.
  - Boylston Office Corp.
  - Dedham Office Associates
  - Dedham Property Associates, Inc.
  - Investors Real Estate Corp.
  - Marlboro Hotel Corp.
  - Los Olas Inn, Inc.
  - Peabody Hotel Corp.
    - Peabody Management Corp.
  - Western Realty Co., Inc.

Subsidiaries of Bankers Trust Company

- BT Aeron, Inc.
- BT Barges, Inc.
- BT Burships, Inc.
- BT Philmor, Inc.
- BT Ventures, Inc.
- BT Green, Inc.
- BT Ever, Inc.
- BT Harborside Urban Renewal Corporation
- BT Harborside, Inc.
- BT Straits, Inc.
- Bankers Company Inc.
- Bankers Trust Nominees, Ltd.
- Bankers Trust Company International
- BT Bank of Canada
- BT Corp.
  - BT Financial Corp.
- BT Pyramid Corp.
  - BT Cargo, Inc.
  - BT Despatch, Inc.
  - BT Equipment Leasing, Inc.
  - BT Expedition, Inc.
- BT Sing, Inc.
- Trybaco Holding Corp.
- Bankers Company of New York
  - Bankers Trustee Company, Ltd.
- Bankers International Corporation
  - Bankers Trust Holdings (Europe) Ltd.
    - Bankers Trust (France) S.A.
  - Bankers Trust Holdings (U.K.) Ltd.
    - Bankers Trustee Company, Ltd.
    - Bankers Trust International Ltd.
      - BTI Investments Ltd.
      - Lognee Holdings Ltd.
      - Ezando Ltd.
  - New Broad St. Properties Ltd.
    - Shipton Automation Ltd.
  - Rodo Nominees Ltd.

Rodocanachi Leasing Ltd.
Private Export Funding Corp.
Petroquimica del Atlantico S.A.
Bankers Trust Finanziaria S.p.A.
BTL do Brazil Ltda.
    Bankers Trust Leasing do Brazil
B.T. Rio de la Plata, S.A.
B.T. International (Nigeria) Ltd.
B.T. Overseas Representatives, Inc.
Piramide Servicos Limitada
Sandecoates Ltd.
    Alfama Company Ltd.
B.T. International (Delaware) Inc.
    B.T. International (Nigeria) Ltd.
    BTL do Brazil Ltda.
        Bankers Trust Leasing do Brazil
    Banque du Benelux
    Bankers Trust Finanziara S.p.A.
    Bankers Trust Italia S.r.l.
    Piramide Servicos Limitada
    BT Foreign Investment Corp.
        Bankers Trust International Services Ltd.
        BT Investment Management Ltd.
        Bankers Trust AG
        Banque du Benelux S.A.
        B.T. (Cayman) International Ltd.
            BTSA Panama
        B.T. Asia Limited
            BT Nominees (H.K.) Ltd.
        BT Finance (H.K.) Ltd.
        B.T. Holding GmbH
        BT Australia Limited
            BT Australia (H.K.) Ltd.
            BT Australia (U.K.) Ltd.
            San Lucar Pty. Ltd.
            Clopa Pty. Ltd.
            BT Lease Packaging Pty. Ltd.
            BT Leasing (No. 3) Pty. Ltd.

Rulan Pty. Ltd.
Runala Pty. Ltd.
Rovenda Pty. Ltd.
Rovny Pty. Ltd.
Respus Pty. Ltd.
Vanne Pty. Ltd.
Varzy Pty. Ltd.
Lysona Pty. Ltd.
Tegney Pty. Ltd.
Talamba Pty. Ltd.
Tedina Pty. Ltd.
Tenata Pty. Ltd.
BT Leasing (No. 1) Pty. Ltd.
Quexon Pty. Ltd.
BT Securities Ltd. (formerly BT Securities Pty. Ltd.)
BT Finance Pty. Ltd.
BT Nominees Pty. Ltd.
Pendal Nominees Pty. Ltd.
Ryan House Development Pty. Ltd.
BT Leasing Services Pty. Ltd.
BT Consultants Pty. Ltd. (formerly BT Pty. Ltd.)
Share Australia Management Ltd.
Bankers Trust International (Asia) Ltd.
Bankers Trust GmbH
Thai Investment & Securities Co. Ltd.

Other Real Estate Subsidiaries of Bankers Trust Company
Anvers Investors, Inc.
Bercy Investors, Inc.
Duroc Investors, Inc.
Ero Properties, Inc.
Ero Properties Pacific, Inc.
Great Lakes Realty Corp.
Jasmin Investors, Inc.
Lessprop Investors, Inc.
Lessprop Investors Atlantic, Inc.

Lourmel Investors, Inc. (incorporated in New York)
Melba Investors Atlantic, Inc.
Melba Investors Northeast, Inc.
Melba Investors Northwest, Inc.
Melba Investors Southeast, Inc.
Melba Investors Southwest, Inc.
Melba Investors Pacific, Inc.
Pecos Investors, Inc.
Pecos Investors Pacific, Inc.
Pelleport Investors, Inc.
Protean Investors, Inc.
R.B. Corporation
Raspail Investors, Inc.
Realprop Investors Atlantic, Inc.
Realprop Investors Pacific, Inc.
Reo Resources, Inc.
Reo Resources Atlantic, Inc.
Sablons Investors, Inc.
Sarel Investors Atlantic, Inc.
Sarel Investors Pacific, Inc.
Sarel Investors Florida, Inc.
Valley Forge Estate, Inc.
Varrene Investors, Inc.
Vikell Investors, Inc.
Vikell Investors Pacific, Inc.
Wagram Investors, Inc.

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No. 84-648 and No. 84-657

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-648

SEDIMA, S.P.R.L.,
Petitioner,

- v. -

IMREX COMPANY, INC., et al.,
Respondents.

No. 84-657

BANKERS TRUST COMPANY,
Petitioner,

- v. -

DANIEL RHOADES, et al.,
Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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17 pp

TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities.....	ii
Interest of Amicus Curiae.....	1
Reasons For Granting The Writs.....	7
Conclusion.....	12

TABLE OF AUTHORITIES

Cases:	Page
Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir.1984).....	5
Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984).....	passim
City of Milwaukee v. Hansen, Civ. No. 77-246 (E.D.Wis. Jan. 13, 1981).....	6,11
City of New York v. Arnmart Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec.21, 1983).....	5,8
City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24,1981).....	6
City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., filed November 16,1981).....	6
County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982).....	5
County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981).....	5

Cases: Page

Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984)..... 5

Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D.Md. 1980)..... 5

Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983)..... 5

Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D.Alaska 1982)..... 5

New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y.,filed December 21, 1983..... 5

Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984)..... passim

Statutes:

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.§§ 1961-1968..... passim

New York City Charter, Ch. 16, §394..... 2

Other Authorities: Page

Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983)..... 4

Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing The Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983)..... 4

116 Cong. Rec. 35,343 (1970)..... 9

116 Cong. Rec. 35,344 (1970)..... 9

No. 84-648 and No. 84-657

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DANIEL RHOADES, et al.,
Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York ("City") submits this amicus curiae brief in support of the petitions for

writs of certiorari to the United States Court of Appeals for the Second Circuit.* The decisions of the Second Circuit in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984) and Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984), threaten the vitality and effectiveness of a statutory remedy used by the City and other local or state governments to combat systematic fraud and governmental corruption.

The New York City Charter charges the City with the responsibility of representing and protecting the public interest and the rights of its citizens. New York City Charter, Ch. 16, § 394. The City is also charged with the institutional responsibility of protecting its capability for delivering honest, efficient, impartial and effective governmental services to all its citizens. Id.

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*A third, recently-filed petition for a writ of certiorari to the Second Circuit, Joel, et al. v. Cirrito, et al., No. 84-604, raises some of the same issues as those herein. The City supports the issuance of a writ in that case for the same reasons stated herein.

In fulfilling its obligations, the City, as well as other localities, must confront the persistent challenges and dangers, as well as the corrupting influence posed by systematic criminal frauds. Tax evasion or public contractor frauds cause massive economic loss to the City. Bribery and kickback schemes injure the public fisc and impair the integrity of government. Public benefits programs are repeatedly targeted by malefactors who defraud the government and the intended beneficiaries. Organized drug trafficking and arson for profit schemes create extraordinary demands on police and other governmental services and diminish the quality of life in the City.

These criminal activities are often accomplished through sophisticated means, by criminal enterprises which systematically commit multiple criminal acts. Ordinary civil and criminal remedies available to penalize specific criminal acts and offer recompense to the City are insufficient to

eradicate the widespread problems caused by the systematic misconduct of criminal enterprises. Extraordinary remedies are needed to eradicate these widespread problems.

The City has found that the civil remedy provision in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") is an effective weapon for combatting these various criminal schemes and protecting the public interest, the public fisc and the institutions of local government.* Specifically, the City has employed the civil remedy provision in RICO to attack fraudulent tax evasion and illegal bidding

*The City's view is shared by commentators. See Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983); Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing The Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

schemes.* In City of New York v. Arnmart Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983) the City sued eleven beer distributors and their principal officers for

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*Civil RICO actions have also been employed by or on behalf of state or other local governments to recover the loss flowing from complex and far-reaching frauds, often accompanied by bribery or some other form of corruption. See New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y., filed December 21, 1983) (bribery and overcharges in connection with toxic waste disposal contract); County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981) (bribery and bid rigging in connection with sewer construction project); Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983) (taxpayers' civil RICO action arising from political slush fund payoffs, kickbacks, and money laundering scheme); Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir. 1984)(bribery and fraudulent billing by office supply company); Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984) (fraudulent underreporting by stockyard of weight and grade of ranchers' livestock, causing higher reimbursement payments to ranchers by state); County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982) (bribery and bid rigging in connection with telephone cable contracts); Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D.Md. 1980) (bid rigging and bribery in connection with demolition work for urban renewal project).

their perpetration of an elaborate series of schemes — described in greater detail, infra — to evade the City's beer excise and general corporation taxes. In City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., filed November 16, 1981), the City sued the operators of a group of massage parlors who systematically laundered their revenues, committed bribery and evaded City taxes. In City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24, 1981) the City sued a fuel oil company and its principal officer for the damages flowing from a fraudulent bidding and overbilling scheme. In addition, the City has explored the possibility of a civil RICO action to recover the losses arising from extraordinary demands on local governmental services and diminution of the quality of life caused by the systematic misconduct of criminal enterprises.*

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*Compare City of Milwaukee v. Hansen, Civ. No. 77-246, slip op. at 3-4 (E.D.Wis. Jan. 13, 1981) (arsonists liable for treble the cost of fighting fires).

REASONS FOR GRANTING THE WRITS

The Second Circuit's decisions in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984) and Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984) destroy the efficacy of the civil remedy provision in RICO and consequently the ability of local and state governments to vindicate the public interest by means of that statute.

The prior conviction requirement created in Sedima, supra, 741 F.2d at 496-504 -- which has absolutely no basis in the statute -- makes local and state government civil RICO suits subject both to a prosecutor's prior exercise of discretion to commence a criminal action, and to the prosecutor's prior success in the criminal action. Thus, the prior conviction requirement strips local and state governments of independent use of an effective weapon against corruption, large-scale frauds and other broad-based criminal schemes.

The prior conviction requirement will bar many actions clearly contemplated by Congress when it enacted the civil remedy provision in RICO. For example, in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, eleven beer distributing companies evaded excise taxes on wholesale beer purchases in New York City by fraudulently representing sales of beer to be sales of soda; laundering beer sales through fictitious purchasers residing outside the City; engaging in off-the-books cash transactions; filing fraudulent tax returns; and failing to file tax returns. This is the kind of systematic criminal scheme which RICO was designed to eliminate. The City decided to bring a civil RICO treble damages action since treble damages would be most effective as a deterrent and as a means of recovering losses.*

*Referring a case to a criminal prosecutor does not guarantee that there will be a criminal prosecution, since the decision to do so is then within the prosecutor's discretion. Prosecutorial priorities may differ from the City's priorities, and prosecutorial resources are limited.

Because there were no prior convictions, the perpetrators of these schemes will totally escape civil liability under RICO - if the prior conviction requirement created in Sedima is not overruled.

The differing "racketeering injury" requirements in, respectively, Sedima and Bankers Trust, similarly eviscerate the utility of the civil remedy provision in RICO. The "mobster" requirement created in Sedima, supra, 741 F.2d at 494-96 is either so vague or so limited as to impose an insuperable obstacle to success in a civil RICO suit. It is contrary to the express intent of Congress, which feared that such a requirement would create an unconstitutional "status" offense. 116 Cong. Rec. 35,343 (1970). It is also contrary to the spirit, structure and language of the statute, which defined prohibited racketeering activity in terms of conduct rather than association. See 116 Cong. Rec. 35,344 (1970); see generally 18 U.S.C.

§§ 1961-1968. The "distinct RICO injury" requirement created in Bankers Trust, supra, 741 F.2d at 515-18, similarly debilitates the civil remedy provision in RICO, by illogically requiring a differentiation between the injury caused by any one predicate act and the injury caused by the RICO offense.

The Second Circuit's analysis in Bankers Trust of how the civil remedy provision in RICO would apply in a case of arson for profit demonstrates that the "distinct RICO injury" requirement deprives the civil remedy provision in RICO of any practical significance. In Bankers Trust, supra, 741 F.2d at 517, the Second Circuit stated that an example of a "distinct RICO injury" could be found where a victim of multiple arsons was denied fire insurance and thereafter was unable to obtain reimbursement for innocent fire damage (e.g., destruction caused by lightning). In contrast, the Second Circuit seemed to indicate that the

victim of repeated arsons could not sue the arsonist for fire damage directly resulting from fires set by the arsonist. Plainly, such analysis destroys the effectiveness of the civil remedy provision in RICO as a method for combatting crime, and erodes the doctrine established in City of Milwaukee v. Hansen, supra, that the damage directly resulting from arson - in that case, municipal fire-fighting costs - is compensable in a civil RICO suit. Plainly, such analysis undermines the purposes of the civil remedy provision in RICO — augmented compensation to the victim for all of its losses resulting from the criminal scheme, and the economic destruction of the criminal enterprise.

CONCLUSION

For the reasons set forth herein, amicus curiae, The City of New York respectfully urges that the Court grant the petitions for writs of certiorari to review the decisions of the Second Circuit Court of Appeals.

November 21, 1984.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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30 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Bankers Trust Company's ("Bankers") petition for certiorari herein, in stating the question presented for review, commits at least three inaccuracies.

First: The petition misstates the ground on which the Court of Appeals based its decision. The Court did not say that a civil RICO action will not lie "if plaintiff's injuries were caused by the criminal acts through which the enterprise was conducted", (as asserted in the petition, page i).

Rather, the Court of Appeals' opinion clearly states that the complaint must allege an "injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation", (Appx. to Petition, p. 14a).

Second: The petition fails to refer to a question which was raised below but not answered, that is: Does Bankers have standing to sue? The Court of Appeals decision affirming dismissal of the complaint made it unnecessary to decide this question. Plaintiff's standing to sue is a threshold question. Once the Court recognizes that plaintiff has no standing to sue, then the judgment below must stand, regardless of the interpretation of RICO sections 1961, 1962, and 1964.

Third: By the curious omission of any reference to the pleadings, Bankers' petition presents a completely unfocussed and erroneous picture of the issues presented. Nowhere does the petition mention that it seeks a review of a Court of Appeals affirmance of a District Court judgment on the pleadings, which dismissed the complaint on motion because it did not state an enforceable claim.

Neither the petition nor the 139 page appendix to it quotes from, or contains a copy of the complaint. That approach facilitates Bankers' unrestrained misdescription of its alleged injured innocence, and of respondents' alleged infamy. Moreover, it obfuscates the precise question presented. We therefore append a copy of the complaint hereto.

The precise questions presented for review are:

First: Does the complaint state a cause of action for a civil remedy under U.S. Code Title 18, Section 1964 although

(a) it fails to allege that any violation of Section 1962 caused any injury to the plaintiff,

(b) but instead, alleges that certain acts of the nature described in Section 1961 caused the alleged injury?

Second: Does the plaintiff have standing to assert this alleged injury?

If the answer to the latter question is "no", the other question need not be decided.

TABLE OF CONTENTS

	Page
Counter Statement of the Question Presented For Review	i
Table of Authorities	iv
Statement of the Case	2
1. The Alleged Bankruptcy Fraud	2
2. The Alleged Bribery	3
3. The Alleged RICO Injury to Bankers	4
Reasons for Denying the Writ	4
I. The Plaintiff Has No Standing to Sue	4
II. The Complaint Fails to Allege that Plaintiff Was Injured By a Violation of Section 1962	6
III. The Question of RICO Interpretation is Moot	7
Conclusion	8
Supplemental Appendix	SA-1
The Complaint	SA-1

TABLE OF AUTHORITIES

CASES:	Page
Bankers Trust Co. v. Rhoades, S.D.N.Y. 1981 Civ. 6849	3
Demsey and Associates v. S.S. Sea Star, 500 Fed.2d 409 (2d Cir. 1974)	5
Furman v. Cirrito, (2d Cir. July 27, 1984)	8
Local No. 8-6 v. Missouri, 361 U.S. 363 (1960)	7
New Orleans v. Emsheimer, 181 U.S. 153 (1901)	7
Pepper v. Litton, 308 U.S. 295 (1939)	5
Peters Patent Corp. v. Bates, 295 U.S. 392 (1935)	7
Sedima, S.P.R.L. v. Imrex Co., Inc., (2d. Cir. July 25, 1984)	8
United States v. Alaska S.S. Co., 253 U.S. 113 (1920)	8
TREATISE	
22 American Jurisprudence 2d. 234 ("Damages", Sec. 165)	5
STATUTES	
11 U.S.C. Chapter XI	2, 3, 5
18 U.S.C. Sec. 1961 et. seq.	*passim*

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for writ of certiorari which seeks review of the judgment herein of the United States Court of Appeals for the Second Circuit, entered July 26, 1984.

STATEMENT OF THE CASE

The statement of the case on behalf of Bankers Trust Company ("Bankers") contains half-truths and omissions, and draws conclusions from premises entirely unsupported by the record. The effect of this would be entirely misleading, if uncorrected.

Bankers brought this civil action under U.S.C. Title 18, Section 1964, ("RICO") seeking treble damages from the various defendants herein. Bankers alleged that defendants violated Section 1962, and caused damage to Bankers, by committing wrongs described in Section 1961.

Bankers' petition neglects to mention the procedural history of this case, and argues as if the allegations in the complaint, both factual and argumentative, had been proved below. On the contrary, the defendants filed answers denying the complaint's allegations. Thereafter, defendants moved to dismiss the complaint for failure to state an enforceable claim. The District Court judgment dismissed the complaint, and the Second Circuit Court of Appeals affirmed.

1. The Alleged Bankruptcy Fraud

A reading of the complaint makes it clear that Bankers has no standing to bring this action. This is so for two independent reasons.

First: the principal allegations of wrongful acts are allegations of wrongs done, not to Bankers, but to the creditors of Braten Apparel Corporation ("BAC") a debtor in insolvency proceedings under Chapter XI of the Bankruptcy Act, U.S. Code Title II.

Paragraphs 13 to 28 and 35 to 43 of the lengthy complaint set forth the alleged wrongful acts of defendants as: concealment of assets of a debtor corporation in proceedings under Chapter XI of the Bankruptcy Act, and related acts, that is, incomplete schedules, and misleading testimony at hearings in the Chapter XI proceedings, resulting in a scaling down of corporate debts. However, the scaling down was revoked, so no damage was done by this alleged misconduct.

Furthermore, the complaint (in paragraphs 13, 14, 16, 17, 20, 21, and 41) clearly states that these alleged wrongful acts were directed not against Bankers, but were aimed at defrauding the debtor corporation and all its creditors and other interested parties, whose rights are still subject to determination in the pending proceedings in the Bankruptcy Court.

For example, the complaint alleged that assets were concealed "so that BAC's indebtedness to its creditors would be eliminated" (complaint, par. 13), and "to secrete the asset...from the claims of BAC's creditors" (id., par 14).

As pointed out below, this cause of action asserted by Bankers is one which cannot be asserted by a single creditor. Only a representative of all the creditors of the debtor can assert such a claim. To allow each creditor his own separate RICO action would nullify the bankruptcy law by permitting races for preference (with triple crowns for the victors) that the bankruptcy laws were enacted to prevent.

Second: In the Chapter XI Bankruptcy proceedings Bankers alleged that it was a secured creditor. BAC, the debtor, urged that Bankers was fully secured, that is, that if Bankers properly liquidated its security it would have been fully paid from it, and so it could not participate in the general fund available for unsecured creditors.

The Bankruptcy court has held hearings on this question, but has not yet decided it.

If and when the Bankruptcy court holds that Bankers has been fully paid, then Bankers, not having suffered any damage, will of course have no right to complain of alleged wrongful conduct of the debtor.

2. The Alleged Bribery

Bankers' petition neglects to inform the Court that it brought an action in the United States District Court against Rhoades for civil damages for this same alleged bribery, *Bankers Trust Co. v. Rhoades*, Southern District of New York, 1981 Civ. 6849 (ADS).

Bankers conducted extensive discovery proceedings in that action. It examined a dozen witnesses. It learned among other

things that the Supreme Court of South Carolina had conducted an investigation of the matter and determined that the accusation was without merit.

When Rhoades moved for summary judgment dismissing the complaint, Bankers voluntarily discontinued the action. District Judge Soafer retained jurisdiction to award Rhoades costs and attorney's fees against Bankers.

3. The Alleged RICO Injury to Bankers

The complaint, in paragraphs 50, 51, 52, and 53 states in conclusory language, paraphrasing the statute, that "defendants" have violated Title 18, section 1962 (a), (b), (c), and (d).

However, when the complaint addresses the question of what caused damage or injury to Bankers, it specifically states, (paragraph 54), not that these alleged violations of section 1962 caused Bankers' damages, but that "the fraud of defendants has prevented Bankers from receiving payment of (its) debt". It is obvious from a reading of section 1962 that preventing collection of a debt does not violate that section.

On appeal, the Court of Appeals for the Second Circuit affirmed dismissal of the complaint, with one dissent. In a lengthy opinion the court discussed the statute involved, and stated that the complaint failed to satisfy the statutory requirement that the plaintiff be injured "by reason of a violation of section 1962". See, Appendix to petition, Majority opinion, pp. 3a to 18a; Dissent, pp. 18a to 32a.

REASONS FOR DENYING THE WRIT

I.

THE PLAINTIFF HAS NO STANDING TO SUE

The question of plaintiff's standing to sue should be answered before reaching the question of interpretation of RICO (18 U.S.C. Secs. 1961 to 1964), because a reading of the complaint reveals that petitioner, Bankers, has no standing to bring this action.

The principal wrongs alleged were: concealment of BAC's valuable asset (stock of defendant Brookfield Clothes), by failure to list that stock in the schedules of BAC's assets, thus scaling down debts by obtaining confirmation of a plan of arrangement in Chapter XI through false or misleading testimony that this stock was not owned by BAC.

These alleged wrongs were not done to Bankers, nor did they take anything from Bankers. Rather, an asset was temporarily concealed from all the creditors of BAC, the Chapter XI debtor corporation, to induce them all to agree to a plan of arrangement.

The complaint clearly and repeatedly shows that the injuries alleged were potential injuries to all of the debtor corporation's creditors. This is shown again and again, in paragraphs 13, 14, 16, 17, 20, 21, and 41 of the complaint. There is no showing of any particular injury to Bankers.

These allegations might support a cause of action by BAC's creditors, generally, through their representative in the Chapter XI proceedings. They do not support an action by a single creditor.

Moreover, even these threatened injuries were remedied by the later revocation of the plan of arrangement.

In its brief herein to the Second Circuit Court of Appeals, Bankers admitted that the revocation of the plan of arrangement eliminated any damage to it other than its legal expenses. It is well settled that expenditure for legal fees and other expenses will not be recognized as damages recoverable in a subsequent action between the same parties, 22 American Jurisprudence 2d. 234 ("Damages", Sec. 165). To the same effect, see *Demsey and Associates v. S.S. Sea Star*, 500 Fed.2d 409 (C.A.N.Y. 1974).

The only recognizable damage alleged by Bankers is hindrance and delay in the collection of that part of the debt, if any, still owing to it from BAC and not fully paid from sale of the collateral. As yet, the Bankruptcy judge has not determined whether or not Bankers has been fully paid.

Bankers, having asserted its creditor's claim in the Chapter XI insolvency proceedings, is now attempting by the present action to obtain an unlawful preference over the other creditors, using a different judicial forum.

This court has refused to permit such an attempt to gain an unlawful preference over other creditors in evasion of the bankruptcy law, by using a different remedy in a different forum.

In *Pepper v. Litton*, 308 U.S. 295 (1939), certain assets of an insolvent debtor had been recovered from the debtor corporation by its officers pursuant to a state court judgment in their favor. This Court affirmed the bankruptcy court's order directing return of the assets to the debtor, despite the state court judgment which had ordered them to be paid to the officers. It stated that the bankruptcy court's jurisdiction to provide a remedy for wrongful transfer or concealment of assets "is exclusive of all other courts", 308 U.S. at 304.

The Supreme Court's opinion in *Pepper* states that the remedy for wrongful transfer or concealment of assets of a debtor in insolvency proceedings,

> "while normally enforceable directly by the corporation, ... is, in the event of bankruptcy of the corporation, enforceable by the trustee....for the protection of the entire community of interests in the corporation - creditors as well as stockholders...." (308 U.S. at 307).

Bankers is using this action in a blatant attempt to obtain an unlawful preference to the detriment of the other creditors of BAC. If each creditor of a debtor in Chapter XI (or of a bankrupt) could bring a civil RICO action for such a cause, the race to collect (triply) would be on, and the basic function of the Bankruptcy Act would be frustrated.

II.

THE COMPLAINT FAILS TO ALLEGE THAT PLAINTIFF WAS DAMAGED BY A VIOLATION OF SECTION 1962

As mentioned above, Bankers' complaint paragraph 50 distinctly alleges, albeit in conclusory, not factual fashion, a violation by defendants of 18 U.S.C. Sec. 1962 (a). It alleges violation of Sec. 1962 (b) in paragraph 51, violation of Sec. 1962 (c) in paragraph 52, and violation of Sec. 1962 (d) in paragraph 53.

This detailed pleading shows familiarity with the statute. However, Bankers' complaint does not allege that Bankers was injured by the conduct of an enterprise, or by any other violation of section 1962. It expressly alleges instead, in par. 54, that Bankers' alleged damage was caused, not by any of the section 1962 violations, but by acts specified in section 1961:

> "...the fraud of defendants has prevented Bankers from receiving payment of such debt...In addition, defendants' fraud has caused Bankers to spend over $100,000 in legal fees" etc.

The plain language of the RICO statute supports the decision of the Court of Appeals, that this fails to meet the requirements of standing to pursue a civil remedy under Section 1964. That section permits only that:

> "(c) Any person injured...by reason of a violation of section 1962 of this chapter may sue therefor...and shall recover threefold the damages he sustains" etc.

Bankers' attorneys clearly state in their complaint that the alleged injury to Bankers was not by reason of violation of section 1962. Rather, the complaint says that plaintiff was injured by reason of acts specified in section 1961, that is, acts constituting an insolvency fraud.

It is not surprising that their petition avoids reference to their complaint.

III.

THE QUESTION OF RICO INTERPRETATION IS MOOT

If the question of interpreting the RICO statute as applied to civil remedies, involving the interrelation of Section 1964 of Title 18 with Sections 1961 and 1962, is indeed a question of national interest, then it should be resolved in connection with a dispute which necessarily turns on this point.

This Court has repeatedly held that certiorari should not be granted when the plaintiff has no standing to sue, or the issue sought to be resolved is moot for any reason.

New Orleans v. Emsheimer, 181 U.S. 153 (1901)
United States v. Alaska S.S. Co., 253 U.S. 113 (1920)

In the latter case this Court declined to accept the case although the United States was a party, and although the Court noted that it would be convenient for the government to have the question decided.

To the same effect, see:

Local No. 8-6 v. Missouri, 361 U.S. 363 (1960)
Peters Patent Corp. v. Bates, 295 U.S. 392 (1935)

Since Bankers has no standing to bring this action, any pronouncement herein by this Court will be either dicta, or a mere alternative basis for decision.

Apparently, however, this need not leave unsettled for long the question of the interrelation of RICO sections 1961, 1962, and 1964, since there are presently pending before this Court petitions for certiorari in two other cases which appear to turn upon this legal issue, namely, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, (2d. Cir. July 25, 1984), and *Furman v. Cirrito* (2d Cir. July 27, 1984). If this court wishes to pass upon the interpretation and interrelation of RICO sections 1961, 1962, and 1964, it will be able to do so in those cases by way of a determination, rather than by a mere dictum, which is all the present case permits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents Other than Herman Soifer and Brookfield Clothes, Inc.

Dated November 16, 1984.

SUPPLEMENTAL APPENDIX

United States District Court
Southern District of New York

82 Civ. 5590

BANKERS TRUST COMPANY,

Plaintiff,

– against –

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE, LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

COMP

Defendants.

Plaintiff, by its attorneys Moses & Singer, alleges as follows:

Jurisdiction and Venue

1. This action is brought to recover damages by reason of defendants' violations of the Racketeer Influenced and Corrupt Organization Act, Title 18 U.S.C. §1961 *et seq.*, and under principles of pendent jursidiction. Jurisdiction is proper pursuant to 18 U.S.C. §1964(a). Venue is proper pursuant to 18 U.S.C. §1965(a) since all defendants either reside, are found, have agents, or transact business in this district.

Parties

2. Plaintiff Bankers Trust Company ("Bankers") is a corporation incorporated under the laws of the State of New York, with its principal place of business in New York. Bankers is engaged in the banking business.

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3. Defendant Milton Braten ("Braten") is a resident of New York State. Braten is a principal shareholder in and an officer of Braten Apparel Corporation, a New York corporation ("BAC"), and an officer, director and/or shareholder (directly or through other corporations or trusts) of all of the corporate defendants.

4. Defendant Daniel Rhoades ("Rhoades") is an attorney admitted to practice before the Courts of the State of New York and the United States District Court for the Southern District of New York. Rhoades is counsel to Braten, BAC, and the other corporate defendants and is an officer, director and/or shareholder of BAC and (directly or through other corporations or trusts) of all of the corporate defendants.

5. Defendant Walter Feldesman ("Feldesman") is an attorney admitted to practice before the Courts of the State of New York and the United States District Court for the Southern District of New York. At various times alleged herein Feldesman has represented, or purported to represent or continues to represent, BAC, defendant Brookfield Clothes, Inc., ("Brookfield") and /or defendant Herman Soifer.

6. Defendant Herman Soifer ("Soifer") is a resident of New York State. Soifer is a shareholder in BAC and an officer, director and/or shareholder (direct or indirect) of all of the corporate defendants.

7. All of the named corporate defendants (sometimes referred to as the "corporate defendants") are incorporated under the laws of, and have their principal places of business in, the State of New York.

8. The "John Doe" defendants are persons whose identities are now unknown to Bankers and are such other individuals, firms and corporations which own, comprise, participate in or control the enterprise hereinafter described, or which are owned or controlled by the individual defendants.

9. Feldesman, Rhoades, Braten and Soifer participate in, own, and/or control BAC and the corporate defendants; and

they, and the corporate defendants, constitute an enterprise engaged in, and whose activities affected, interstate commerce. So far as now known to Bankers, the business of the corporate defendants includes the import, manufacture and sale of goods, in New York, South Carolina and elsewhere, resulting in a business receiving over $50,000,000 per year.

10. At all relevant times Bankers was and still is a creditor of BAC. The debt, inclusive of interest, owed by BAC to Bankers, as at the date of this complaint, exceeds the amount of $4,000,000.

11. In August of 1974, BAC acquired, and it owned, all of the stock of Brookfield. Brookfield then had net assets, in excess of liabilities, of more than $3,000,000.

12. In August 1974, BAC owed substantial debts to Bankers and to others, and had recently sustained severe losses.

13. In August 1974, Feldesman, Braten and Soifer intended and agreed that BAC's recently acquired ownership of Brookfield be concealed and that BAC seek to obtain an arrangement with its creditors pursuant to Chapter XI proceedings to be brought in Bankruptcy Court, so that BAC's indebtedness to its creditors would be eliminated and, subsequent thereto, Braten and Soifer would be the owners of an enterprise including BAC and Brookfield.

14. In late August 1974, in order to secrete the asset which BAC had recently acquired, i.e., the stock of Brookfield, from the jurisdiction of the Bankruptcy Court and from the claims of BAC's creditors, Feldesman drafted, and Braten and Soifer executed, a document hereinafter described as the "Shareholders' Agreement".

15. Pursuant to one clause contained in the Shareholders' Agreement, BAC or Braten was required to furnish to Brookfield a $250,000 loan by a specified date, in default of which BAC's stock in Brookfield, held by Feldesman, would appear to be owned by Soifer.

16. Feldesman drafted the Shareholders' Agreement, and Soifer and Braten executed the same, at a time when they knew and intended that the apparent condition therein had not and would not be met, with the intent that BAC's creditors, upon being shown the Shareholders' Agreement and being told that the condition had not been met, would be led to believe that BAC no longer had any interest in Brookfield.

17. The Shareholders' Agreement was a sham and was not intended by Feldesman, Braten or Soifer to have any legal validity as between or among BAC, Braten and Soifer. Instead, an understanding and agreement existed among Braten, Soifer and Feldesman that Brookfield would be held in secret trust by Soifer during the pendency of BAC's Chapter XI proceedings, and would be returned to BAC after BAC had achieved the elimination or scaling down of its debt through a confirmed plan of arrangement in the Chapter XI proceedings. Although Feldesman had represented BAC and its principals since prior to August, 1974, Feldesman represented to creditors that he was counsel to Soifer and not BAC. Moreover, and on behalf of Soifer, Feldesman misrepresented to Bankers and to BAC's other creditors the validity of the Shareholder Agreement, in the manner herein alleged.

18. To further their scheme, among other things, Feldesman caused the stock of Brookfield to be transferred to Soifer; and Feldesman counseled BAC to file a petition in Chapter XI before the United States District Court for the Southern District of New York omitting BAC's ownership of the stock of Brookfield and omitting also the transfer of said stock to Soifer, which Braten caused BAC to do on September 5, 1974. Feldesman acting on behalf of BAC, caused to be retained Leinwand, Maron, Hendler & Krause ("Leinwand") as attorneys for BAC in the said Chapter XI proceedings. Thereafter, Feldesman recommended that Rhoades be retained as counsel to Braten and, ultimately, as counsel to BAC in said Chapter XI proceeding. Rhoades was retained in both capacities. In October 1974, without the disclosure thereof to the Bankruptcy Court or to Bankers, Feldesman received a "forwarding fee", from or on behalf of BAC or Leinwand, in respect of services rendered by

Feldesman for BAC, in conjunction with Leinwand, in connection with said Chapter XI proceeding. Feldesman continued as counsel to Brookfield, receiving at least $18,000 annually on retainer, which payments continue to date.

19. Feldesman, Soifer, Rhoades and Braten omitted to reveal to Bankers the secret trust, referred to herein, and they affirmatively misrepresented to Bankers and to the Bankruptcy Court that the apparent condition in the Shareholders' Agreement had not been met, and that therefore BAC had no ownership interest in Brookfield. Bankers believed and relied upon such omissions and misrepresentations to its detriment, inter alia, by accepting a plan of arrangement proposed by BAC whereunder it would accept 17 1/2% of its allowed claim therein.

20. Such misrepresentations. omissions and false statements, among others, were made under the following circumstances, all in the City of New York: (A) Feldesman, as purported attorney for Soifer and Brookfield, represented to Bankers that Soifer was the owner of Brookfield on, among other dates, September 4, 1974, and in the period from May through July 1975; (B) Soifer made the same representation in a statement intended by him to be disseminated to BAC's creditors, including Bankers, which was published on August 27, 1974; (C) Braten represented to Bankers that BAC had no interest in (or had lost its interest in) Brookfield on, among other dates: August 27, 1974, in a meeting attended by Braten; September 5, 1974, in BAC's Chapter XI written petition and supporting schedules, all of which were sworn to by Braten; December 5, 1974, in Braten's sworn testimony in Bankruptcy Court; December 12, 1974, in financial statements of BAC prepared in relevant part by Braten and distributed to BAC's creditors, including Bankers, at a meeting held that day; and (D) Braten and Rhoades made the same or substantially the same representations on, among other dates: August 22, 1975, in a pleading prepared by Rhoades in behalf of BAC and verified by Braten; September 30, 1975, in an amended pleading prepared by Rhoades on behalf of BAC and verified by Rhoades; January 27, 1976, in Braten's sworn testimony given in Bankruptcy Court, the substance of which

was prepared in part by Rhoades; March 8, 1976, in an amendment to BAC's schedules sworn to by Braten, and submitted by Rhoades to the Bankruptcy Court; and March 9, 1976, in Rhoades' testimony in Bankruptcy Court.

21. By reason of the individual defendants' misrepresentations and omissions BAC's creditors, including Bankers, were induced to believe that BAC did not own the stock of Brookfield and they were induced to accept a plan of arrangement based on assets of BAC which did not include said stock. Bankers' acceptance of said plan was necessary to the obtaining of assent of the majority, in dollars owed, of creditors, and, as such, necessary to its confirmation.

22. On March 12, 1976 the Bankruptcy Court made an order confirming BAC's plan of arrangement. As a net effect of such confirmation, BAC was relieved of debts of more than $4,300,000.

23. On or about March 12, 1976 (a) Brookfield had or anticipated sales of approximately $18 million per year and net income in excess of $1.4 million per year, (b) Brookfield had a value in excess of $10 million, and (c) the stock of Brookfield was an asset of BAC having value sufficient to have paid in full the debt owed to Bankers.

24. Had Bankers known that the stock of Brookfield was an asset of BAC, the plan of arrangement proposed by BAC would not have been accepted by Bankers. Had Bankers discovered, between September 1975, the time when Bankers filed its acceptance of the plan, and March 1976, that the stock of Brookfield was an asset of BAC, it would have revoked its acceptance of the proposed plan prior to the confirmation order. A plan of arrangement made with the stock of Brookfield as a revealed asset of BAC, or a liquidation of BAC whose assets included the stock of Brookfield, would have resulted in an amount sufficient to have paid in full the debt owed to Bankers.

25. Commencing in August 1976, the individual defendants participated in the beginning of Soifer's consummation of his part of his secret trust with Braten. Among other things, in or about August 1976, Soifer acquired from Braten 50% of the stock of defendant Brookfield Industries, Inc., to which entity a substantial

portion of the assets of Brookfield were conveyed; and on August 20, 1976, Feldesman delivered the stock of Brookfield to Soifer who, in turn, delivered such stock to Rhoades on behalf of Braten and BAC.

26. In late August 1976, Rhoades, Soifer and Braten revealed to Brookfield's then-auditors that, since August 1974, BAC had been and continued to be the owner of the Brookfield stock.

27. In October 1976, the individual defendants continued to create the corporate enterprise of which they were to become, and did become, the owners or participants. In October 1976, Soifer purchased from Braten 45% of the stock of BAC. In July 1977, Soifer delivered to Braten his $450,000 note, in part payment for said BAC stock, which note was then assigned by Braten to Rhoades.

28. In September 1976, Bankers commenced a proceeding in this Court to revoke BAC's confirmation of its arrangement as having been procured by fraud. In the course of such proceeding Bankers ascertained the secret trust referred to above and the falsity of the representations referred to herein.

29. In order to further hinder and delay Bankers' collection of the debt owed to it Rhoades and Braten instituted a series of lawsuits against Bankers in New York State in the name of BAC and Braten, and participated in and caused the institution of lawsuits in New York State, against Bankers, in the name of other corporations owned or controlled by Braten. In those actions the complaints alleged, in substance, that Bankers breached some commitment to continue extending credit to BAC, and the complaints sought damages in the millions of dollars. All of said claims were summarily dismissed after Bankers had incurred and paid substantial legal expenses in connection therewith.

30. In August 1977, BAC, by a South Carolina law firm to which Rhoades was counsel, instituted an action against Bankers in the State of South Carolina (the "South Carolina Damages Action") seeking $195,000,000 in damages by reason of allegations similar to those made in the aforedescribed New

York actions. In addition, in or about August 1977 another South Carolina action was pending (the "Escrow Action"), in which Braten, by the same South Carolina law firm, asserted claims, superior to those of Bankers, to funds in escrow arising out of the sale of machinery in which Bankers had a security interest.

31. At the relevant times, William H. Ballenger was the Judge presiding in both the South Carolina Damages Action and the Escrow Action.

32. In late 1978 and early 1979, among other things, Rhoades, through a South Carolina corporation formed by him, agreed to and did acquire or assume a mortgage debt in respect of real property, on which debt Judge Ballenger was personally obligated to the extent of $100,000, and Rhoades has paid such debt to the obligee as installments thereof have become due.

33. By reason of the aforementioned transactions, by which Rhoades conferred a benefit on Judge Ballenger, Judge Ballenger was induced to render decisions favorable to BAC and to Braten. Among other things, by order dated January 18, 1979 Ballenger appointed, as Special Referee in the Escrow Action, having powers which could deprive Bankers of the right to a jury trial, an attorney who was the former law partner of the lawyer to whose firm Rhoades was counsel; and, by order dated November 9, 1978, Judge Ballenger denied Bankers' motion to dismiss the South Carolina Damages Action.

34. The acts of Judge Ballenger, induced by the benefits conferred by Rhoades, caused Bankers to expend over $100,000 in legal fees, which Bankers incurred until (a) Judge Ballenger recused himself from the Escrow Action because of a "possible conflict of interest," and (b) Judge Ballenger's decision refusing to dismiss the South Carolina Damages Action was reversed by the Supreme Court of that State, as an abuse of discretion.

35. The trial of the revocation proceeding brought by Bankers, referred to in paragraph "28", concluded on February 1, 1982. The individual defendants, all of whom testified in the trial, knew that the Bankruptcy Court would proceed to decide the cause and render its opinion.

36. In January 1982, defendant Bennington Court Ltd. obtained advances of over $8.9 million from KB Business Credit Inc. ("KBBC"), a financing company. These advances were obtained by means of wire transfers of funds, requested of KBBC, and made to the corporate defendants' bank accounts located in New York City, Greenville, South Carolina, and San Francisco, California. These funds were disbursed, transferred among, or secreted or abstracted by the members of the enterprise.

37. Some of the above-named corporate defendants issued to KBBC checks drawn on insufficient or uncollected funds, or on stopped bank accounts, and otherwise failed to repay to KBBC the over $8.9 million obtained by the enterprise.

38. KBBC then commenced a lawsuit in this Court against many of the defendants herein, and others affiliated with the defendants herein, captioned "KB Business Credit, Inc., Plaintiff, against Milton Braten, et al." In said lawsuit KBBC charged said defendants, *inter alia*, with wire fraud and other acts constituting violations of Title 18 U.S.C. §1961 *et seq.*, and KBBC sought to recover treble the amount of its damages from the defendants.

39. In April 1982, at a time when BAC was a party to the revocation proceeding and a decision by the Bankruptcy Court was awaited, and at a time when BAC, Braten, Rhoades and other members of their enterprise were defendants in the KBBC lawsuit, BAC conveyed its stock in Brookfield to defendant Todd Equipment Leasing Co., Inc. ("Todd") for no consideration or an inadequate consideration. As of June 29, 1982, defendants had not yet decided who would be shown to be the owner of Todd. On August 5, 1982, Rhoades, Braten and their counsel represented that Todd is owned by defendant Capital Aid Corporation, which in turn is owned by Rhoades as a "nominee" or trustee for the benefit of Braten and Soifer, although, even on August 5, 1982, said counsel represented that no documents had been prepared or executed to reflect such represented beneficial ownership.

40. In April 1982, in order to induce KBBC to discontinue its lawsuits and thereby relieve the named individual defendants of personal liability, BAC caused Todd, which was not sued as a defendant in the KBBC lawsuit, to pledge to KBBC the Brookfield stock. Such pledge was made to secure more than $8.9 million obtained from KBBC by the other defendants forming part of the enterprise.

41. During the pendency of the revocation proceeding, and while BAC was a party to said judicial proceeding, BAC secreted and conveyed its assets, and those of its affiliates and subsidiaries, including making conveyances to the remaining defendants herein without any consideration to BAC or the transferors, to further hinder and prevent the satisfaction of the claims of Bankers and of other creditors. Such conveyances, including the transfer of the stock of Brookfield, were made at a time when BAC was insolvent, or which rendered BAC involvent.

42. On June 25, 1982, as amended on June 30, 1982, the Bankruptcy Court rendered its Opinion in the revocation proceeding. The Bankruptcy Court found, among other things, that the individual defendants had devised, participated in and furthered a scheme to defraud; that the fraudulent conduct included the making of false oaths in BAC's schedules as to the assets of the estate; that the individual defendants had intentionally concealed property of BAC; and that the confirmation of BAC's plan of arrangement had been procured by the individual defendants' fraud.

43. On June 30, 1982, the Bankruptcy Court made and entered an order which, among other things, revoked the confirmation of BAC's plan of arrangement and reinstated the Chapter XI proceeding.

44. The preparation and execution of the sham Shareholders' Agreement and the apparent transfer of the stock of Brookfield to Soifer, in contemplation of BAC's commencement of a case under U.S.C. Title 11, constituted the knowing and fraudulent transfer and concealment of property and a criminal offense involving fraud connected with a case under U.S.C. Title 11.

45. The making of false oaths in BAC's schedules on September 5, 1974 and on March 8, 1976; the giving of false testimony under the penalty of perjury on December 5, 1974 and on January 27, 1976 by Braten, and on March 9, 1976 by Rhoades; and each of said acts, were criminal offenses involving fraud connected with a case under U.S.C. Title 11.

46. The knowing and fraudulent concealment and transfer of the property of BAC, including the stock of Brookfield, began in August 1974, continues to date, and is a criminal offense involving fraud in connection with a case under U.S.C. Title 11.

47. The transactions between Rhoades and Judge Ballenger were acts involving bribery, which is a criminal offense chargeable under State law and punishable by imprisonment for more than one year.

48. The conveyance by BAC to Todd of BAC's stock in Brookfield, and Todd's receipt of that stock and pledge thereof to relieve the members of the enterprise of their personal liability, were made knowingly, and with intent to defeat the provisions of U.S.C. Title 11, and each of said acts were criminal offenses involving fraud connected with a case under U.S.C. Title 11. The said conveyance and pledge of Brookfield stock has caused the assets of BAC, as of the date of this complaint, to be insufficient to pay the debt owed to Bankers.

49. Each of the foregoing offenses is a "racketeering activity," and any two or more of them constitute a "pattern of racketeering activity," within the meaning of 18 U.S.C. §1961.

50. Defendants have used income derived from the pattern of racketeering activity in the establishment, acquisition and maintenance of controlling interests in the enterprise of affiliated corporations, in violation of 18 U.S.C. §1962(a).

51. Defendants have maintained their control of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(b).

52. Defendants have participated in and conducted the affairs of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).

53. Defendants have conspired to conceal and secrete the assets of BAC from its creditors, and utilize the income derived thereby to acquire interests in and operate the enterprise, to obtain large sums on credit and divert the income earned or moneys borrowed by the enterprise to and for the benefit of its principals, officers, directors, agents and employees, all in violation of 18 U.S.C. §1962(d).

54. As of the date of this complaint, Bankers has not received payment of the debt owed to it by BAC, the fraud of defendants has prevented Bankers from receiving payment of such debt and constitutes a hinderance and impediment to Bankers' rights to receive payment of such debt. In addition, defendants' fraud has caused Bankers to expend over $100,000 in legal fees incurred in the revocation proceeding, over $100,000 in the South Carolina actions, additional substantial expense in the Chapter XI proceedings, and will cause Bankers to incur substantial legal expense, to correct defendants' fraud, in amounts now unknown.

WHEREFORE, plaintiff demands judgment against each defendant, jointly and severally as follows:

(A) In the amount of plaintiff's damages, which the Court should trebel pursuant to 18 U.S.C. §1964(e);

(B) permanently enjoining defendants from concealing, transferring, or in any way dissipating the funds obtained by them by reason of their conduct of and participation in an enterprise through a pattern of racketeering activity;

(C) against defendants Feldesman and Rhoades, pursuant to New York Judiciary Law §487, in treble the amount of plaintiff's damages;

(D) For such exemplary and punitive damages as may be just and proper;

(E) in the amount of plaintiff's attorneys' fees, pursuant to 18 U.S.C. §1964(c);

(F) the costs and disbursements of this action; and

(G) For such other and further relief as may be just and proper.

Dated: New York, New York
August 20, 1982

MOSES & SINGER

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FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

BRIEF OF RESPONDENT HERMAN SOIFER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a petition for a writ of certiorari be denied where a complaint for treble damages under the civil provisions of RICO has been dismissed because plaintiff's injury arose from the underlying predicate acts rather than from the prohibited pattern of racketeering?

2. Even if dismissal of a complaint seeking treble damages for an injury from the underlying predicate acts should not have been affirmed on the grounds stated in the decision below, should a petition for a writ of certiorari nevertheless be denied because, among other things,

   (a) review of the RICO injury requirement at this time would be premature;

   (b) no relief is available under the civil provisions of RICO for an injury deriving from a simple breach of contract;

   (c) the claim asserted can be pursued only in the bankruptcy court; and

   (d) the applicable statute of limitations has expired?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES AND AUTHORITIES	iv
OPINIONS BELOW	2
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
I. THE COURT BELOW PROPERLY HELD THAT § 1964(c) REQUIRES AN ALLEGATION OF AN INJURY RESULTING FROM A PATTERN OF RACKETEERING ACTIVITY	5
A. The Language Of The Statute Clearly Requires An Allegation Of An Injury Resulting From A Pattern Of Racketeering Activity	5
B. The Legislative History Of RICO Does Not Support Bankers' Interpretation Of The Statute	9
C. The Purported Conflict In The Courts Of Appeals Does Not Support A Grant Of Certiorari In This Case	15
1. The decision below is not in conflict with the holdings of the Fifth and Eighth Circuits	15
2. The conflict with the Seventh Circuit does not support a grant of certiorari in this case	18

PAGE

II. EVEN IF A DISTINCT RICO INJURY NEED NOT BE ALLEGED, CERTIORARI SHOULD NOT BE GRANTED 20

A. Review Of The RICO Injury Requirement At This Time Would Be Premature 20

B. Bankers' Simple Breach Of Contract Claim Cannot Support A RICO Action..... 22

C. The Complaint Is Subject To Dismissal On Other Grounds..... 23

1. The bankruptcy court has exclusive jurisdiction..... 24

2. Bankers' claim is time barred 24

CONCLUSION..... 28

TABLE OF CASES AND AUTHORITIES

Cases PAGE

A.D.M. Corp. v. *Sigma Instruments, Inc.*, 628 F.2d 753 (1st Cir. 1980) 22

In re Action Industries Tender Offer, 572 F. Supp. 846 (E.D. Va. 1983) ..... 13n.

Aetna Casualty and Surety Co. v. *Liebowitz*, 730 F.2d 905 (2d Cir. 1984) ..... 14n.

Alcorn County v. *U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984) 16

Alexander Grant & Co. v. *Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984) 17

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940)..... 12

Armstrong v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983) . . .25n., 26

Associated General Contractors Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983)..... 22

Bankers Trust Co. v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), *aff'g*, 566 F. Supp. 1235 (S.D.N.Y. 1983), *petition for cert. filed*, 53 U.S.L.W. 3367 (Oct. 24, 1984) (No. 84-657) ..... *passim*

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Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) .... 25n.

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)..... 22

Cestaro v. *Mackell*, 429 F. Supp. 465 (E.D.N.Y.), *aff'd*, 573 F.2d 1288 (2d Cir. 1977) ..... 27n.

PAGE

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Cort v. *Ash*, 422 U.S. 66 (1975)..... 12

Davis v. *United States*, 417 U.S. 333 (1974)..... 19n.

District of Columbia v. *Sweeney*, 310 U.S. 631 (1940).. 21

Dolmetta v. *Uintah National Corp.*, 712 F.2d 15 (2d Cir. 1983)..... 25n.

Durante Bros. and Sons, Inc. v. *Flushing National Bank*, 571 F. Supp. 489 (E.D.N.Y. 1983) ..... 25n.

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Federal Trade Commission v. *Bunte Brothers, Inc.*, 312 U.S. 349 (1941)..... 12-13

Fields Productions, Inc. v. *United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir.), *cert. denied*, 401 U.S. 949 (1971)..... 23

Friedlander v. *Nims*, 571 F. Supp. 1188 (N.D. Ga. 1983) 7n.

Furman v. *Cirrito*, 741 F.2d 524 (2d Cir. 1984), *petition for cert. filed sub nom. Joel* v. *Cirrito*, 53 U.S.L.W. 3343 (Oct. 15, 1984) (No. 84-604) ..... 19n.

Gochenour v. *Cleveland Terminals Bldg. Co.*, 118 F.2d 89 (6th Cir. 1941) ..... 24n.

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PAGE

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Hoff Research & Development Laboratories, Inc. v. *Philippine National Bank*, 426 F.2d 1023 (2d Cir. 1970) ..... 27n.

IIT v. *Cornfeld*, 619 F.2d 909 (2d Cir. 1980) ..... 25n.

Imperial Point Colonnades Condominium, Inc. v. *Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977) ..... 26n.

Kadar Corp. v. *Milbury*, 549 F.2d 230 (1st Cir. 1977)... 26n.

Korry v. *International Telephone & Telegraph Corp.*, 444 F. Supp. 193 (S.D.N.Y. 1978) ..... 25n.

Maryland v. *Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950) 20

Mulvey v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) .... 23n.

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Prudential Lines, Inc. v. *McKeon*, 80 Civ. 5853 (MJL) (S.D.N.Y. April 21, 1982) ..... 25n.

Rice v. *Baron*, 456 F. Supp. 1361 (S.D.N.Y. 1978) ...25, 26n.

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PAGE

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Snyco, Inc. v. *Penn Central Corp.*, 551 F. Supp. 949 (E.D. Pa. 1982) 23

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Sporn v. *MCA Records, Inc.*, 58 N.Y.2d 482, 462 N.Y.S.2d 413, 448 N.E.2d 1324 (1983) ..... 26n.

Stull v. *Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) 25

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Fed. R. Civ. P. 9(b) ..... 3n.

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N.Y. Civ. Prac. Law and Rules § 203(f) (McKinney 1972) 26-27

N.Y. Civ. Prac. Law and Rules § 213(8) (McKinney 1972) 25n., 27

H.R. Rep. No. 887, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 3221.. 14

130 Cong. Rec. 13,350 (1984) (Remarks of Senator Thurmond)..... 21

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Respondents.

BRIEF OF RESPONDENT HERMAN SOIFER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Herman Soifer ("Soifer") respectfully submits this brief in opposition to the petition of Bankers Trust Company ("Bankers") for a writ of certiorari.

OPINIONS BELOW

The opinion below of the United States Court of Appeals for the Second Circuit is reported at 741 F.2d 511 (1984) and is reproduced in the Appendix to Bankers' petition ("App.") at 3a-32a. That decision affirmed the judgment entered by the United States District Court for the Southern District of New York following its decision in *Bankers Trust Co.* v. *Feldesman*, which is reported at 566 F. Supp. 1235 (1983) and is reproduced in the Appendix at 33a-47a.

COUNTERSTATEMENT OF THE CASE

As the petition itself states (at 6), this action arises out of Bankers' frustration in collecting a debt. Bankers, one of many creditors of Braten Apparel Corp. ("BAC"), seeks to pursue a claim under the civil provisions of RICO.[1] In substantial part, Bankers' claim is that, as a result of various alleged wrongful acts, the bankruptcy court confirmed a Chapter XI plan of arrangement relieving BAC of more than $4.3 million in debt. Petition at 5. According to Bankers, the creditors of BAC had been induced to accept the plan by respondents' concealment of the fact that BAC owned a valuable asset, Brookfield Clothes, Inc. ("Brookfield"). Bankers alleges that, as a result of this concealment, BAC secured a discharge of indebtedness to which it was not entitled when, in March 1976, the bankruptcy court confirmed the BAC plan. Petition at 5.

Shortly thereafter, Bankers learned of the alleged concealment of the Brookfield asset. 741 F.2d at 513; App. 7a. As a result Bankers, in September 1976, commenced a proceeding in the bankruptcy court to revoke the confirmation of the BAC plan. 741 F.2d at 513; App. 7a. In June 1982, the bankruptcy court revoked that confirmation and ordered BAC to offer a

---

1 "RICO", an acronym for "racketeer influenced corrupt organizations," refers to various criminal prohibitions and civil remedies set forth in 18 U.S.C. §§ 1961 *et seq*. The relevant statutory provisions are reproduced in the Appendix at 128a-33a.

modified plan, reflecting its ownership of Brookfield. 741 F.2d at 513; Petition at 6; App. 8a.[2]

According to Bankers, it discovered that Brookfield was insolvent following the revocation (Petition at 7) and, in August 1982, on its own behalf, Bankers commenced the present action—in the United States District Court and not in the bankruptcy court. Soifer, who had been an officer of Brookfield and a shareholder of BAC, was named as one of many defendants.

In February 1983, Soifer moved to dismiss the complaint on a number of grounds. As relevant here, he showed that Bankers could not maintain a RICO action because

> (a) the sole injury alleged—a shortfall on its debt collection from BAC—was caused directly by the predicate act of bankruptcy fraud;
>
> (b) its claims derived from its status as a creditor of BAC and could only be pursued in the pending bankruptcy court proceeding involving BAC; and
>
> (c) any right to relief was barred by the applicable statute of limitations.[3]

---

2 The bankruptcy court proceeding involving BAC is still pending. Although a modified plan has been proposed, no order has been entered thereon. Nor, as of this date, has the proceeding been converted to Chapter VII of the former Bankruptcy Act, under which a trustee could be appointed to act on behalf of all of the creditors. This Court may take judicial notice of these facts under Rule 201, Fed. R. Evid.

3 In addition, because the complaint on its face was subject to dismissal as against Soifer even if it stated a claim against the other defendants, Soifer's motion also showed that (i) only one predicate act was alleged against him; and (ii) the claims asserted against him did not satisfy Rule 9(b), Fed. R. Civ. P.

Surprisingly, Bankers does not include the complaint in its Appendix, although it was reproduced at A27-A46 in Bankers' appendix to the Second Circuit. The only meaningful allegations in the complaint relating to Soifer concern the alleged concealment of the Brookfield asset. Allegations relating to subsequent actions, such as the so-called bribery and the 1982 disappearance of Brookfield's assets, were directed specifically only at other defendants.

The District Court entered a judgment dismissing the complaint on the ground that it failed to state a claim, holding that the civil provisions of RICO provide relief only for a "distinct RICO injury" caused by a pattern of racketeering activity rather than by the predicate acts that constitute the pattern. In so doing, it did not address the other grounds urged by Soifer in support of his motion. *See* 566 F. Supp. at 1242 n.10; App. 47a n.10.

The Second Circuit, in affirming the dismissal of the complaint, substantially agreed with the District Court's conclusion with respect to the requirement of a distinct RICO injury; it did not address the other arguments urged by Soifer.

SUMMARY OF ARGUMENT

The writ should be denied because the decision of the Second Circuit was correct. By its terms, 18 U.S.C. § 1964(c) limits the right to seek treble damages to situations where a plaintiff alleges that his injury resulted from the conduct of an enterprise through a pattern of racketeering activity, as defined and proscribed by § 1962. Because Bankers has not alleged an injury of that nature it cannot maintain this action.

Furthermore, regardless of whether the Second Circuit was correct on the issue of RICO injury, this is an inappropriate case for review by this Court inasmuch as

(a) review of the RICO injury requirement at this time would be premature;

(b) no relief is available under the civil provisions of RICO for an injury deriving from a simple breach of contract;

(c) the claim asserted can be pursued only in the bankruptcy court; and

(d) the applicable statute of limitations has expired.

REASONS FOR DENYING THE WRIT

I

THE COURT BELOW PROPERLY HELD THAT § 1964(c) REQUIRES AN ALLEGATION OF AN INJURY RESULTING FROM A PATTERN OF RACKETEERING ACTIVITY

The central issue raised by Bankers' petition is whether the Court below erred in a matter of statutory construction: Is a private plaintiff seeking treble damages under § 1964(c) required to allege injury resulting from the acquisition, maintenance or conduct of an enterprise through a *pattern* of racketeering activity? Or does such a plaintiff merely need to allege injury from some of the predicate acts which may have constituted underlying *elements* of that pattern?

The Court below held that the statute requires an allegation of injury from the use of a pattern of racketeering activity in connection with a RICO enterprise. The Court therefore affirmed dismissal of Bankers' complaint because it alleged only an injury caused by the predicate act of bankruptcy fraud.

In support of its petition, Bankers argues that injury from a predicate act is sufficient. However, as will be shown below, Bankers' theory is contrary to the language of the statute, when read either in isolation from, or with reference to, its legislative history. To the degree that Bankers' petition rests on the assertion of a conflict between the decision below and decisions of other circuits, those conflicts are either illusory or inappropriate for resolution on a writ of certiorari in the present case.

A. The Language Of The Statute Clearly Requires An Allegation Of An Injury Resulting From A Pattern Of Racketeering Activity

An understanding of the scope of RICO liability must begin with examination of the structure and language of the statute itself. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

The provisions of RICO were enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941. The statute as a whole was designed for use by federal law enforcement agencies in fighting organized crime. However, one section, 1964(c), authorizes civil actions for treble damages at the instance of private parties.

That section provides:

> "Any *person injured in his business or property by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." App. 133a.

The decision below (741 F.2d at 515-16; App. 12a-14a) analyzed the italicized language by dividing it into three crucial elements:

> (i) the plaintiff's injury must be of a proprietary nature ("business or property");
>
> (ii) the plaintiff's injury must be caused by the defendant's wrongful conduct ("by reason of"); and
>
> (iii) the defendant's conduct must constitute a "violation of section 1962."

Only the third of these—what kind of conduct constitutes a "violation of section 1962"—is at issue here.

Section 1962 is at the core of the criminal provisions of RICO. Among other things, it declares unlawful (a) an investment of income derived from a "pattern of racketeering activity" in any enterprise[4] that is engaged in interstate commerce; (b) the acquisition of such an enterprise through a pattern of racketeering activity; (c) the conduct of such an enterprise's affairs through a pattern of racketeering activity;

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4 Under § 1961(4), the definition of an " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." App. 129a.

or (d) the conspiracy to do any of the foregoing acts. *See* App. 130a-31a.

"Racketeering activity" is defined in the statute as the commission of certain federal or state offenses specified in § 1961(1). These are commonly referred to as "predicate acts." A "pattern of racketeering activity" is defined in § 1961(5) as "requir[ing] at least two acts of racketeering activity" within a ten-year period. App. 129a.[5]

When these definitions are read together, a "violation of § 1962(c)" means that there must have been both a pattern of predicate acts *and* the use of that pattern to conduct the affairs of an enterprise. To satisfy these statutory prerequisites, a private plaintiff must allege the existence and use of such a pattern, as well as an injury resulting therefrom.

The converse is equally true. If all that a private plaintiff alleges is a direct injury from two or more predicate acts, and not from the combination of those acts into a distinct pattern of racketeering activity, then he has no basis under the statute to recover treble damages. Section 1964(c) simply does not grant relief to "any person injured by reason of two or more offenses specified in § 1961(1)." It explicitly requires an allegation of injury by reason of "a violation of § 1962," *i.e.*, by reason of the use of the *pattern* of racketeering activity to conduct the affairs of an enterprise.[6]

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5 In *Sedima, S.P.R.L.* v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984) [App. 48a-106a], *petition for cert. filed*, 53 U.S.L.W. 3367 (Oct. 22, 1984) (No. 84-648), another panel of the Second Circuit held, among other things, that a criminal conviction must be alleged in an action by a private party under the civil provisions of RICO. That issue was not addressed by the panel below (741 F.2d at 516 n.5; App. 14a n.5) and is not raised by the petition herein.

6 This point was well expressed in *Friedlander* v. *Nims*, 571 F. Supp. 1188, 1194 (N.D. Ga. 1983), where the Court dismissed a RICO claim in a securities action:

> "The plaintiff here alleges fraud. Fraud alone, and injury from it, do not give rise to RICO liability.
>
> RICO prohibits, broadly speaking, second stage criminal activity. RICO does not punish or provide a remedy for murder, kidnapping,

As stated by the Court below:

> "Section 1964(c) does not provide a private right of recovery unless the conduct that caused the injury was 'a violation of section 1962.' We must therefore ask what conduct violates that section. Although, as detailed above, § 1962 has a number of facets, it is clear that it does not itself prohibit the predicate acts that constitute racketeering activity. Commission of two or more predicate acts is but an element of a § 1962 violation; those acts do not themselves constitute the § 1962 violation. Indeed, § 1962 does not even prohibit a pattern of racketeering activity, without more. Rather, there is a violation of § 1962 only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise. It is this confluence that constitutes the violation and, therefore, the confluence that must cause the proprietary injury.
>
> The import of this analysis is that if a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by its use of a pattern of racketeering activity in connection with a RICO enterprise, the injury cannot be said to have been caused by 'a violation of section 1962.' *See Sedima, S.P.R.L.* v. *Imrex Co.* . . . Accordingly, we agree with the conclusion of the district court that a civil RICO complaint must allege 'a distinct RICO injury,' by which we mean that it must allege a proprietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation." 741 F.2d at 516; App. 13a-14a (footnotes omitted).

The Court below thus read the requirement that the injury stem from the *pattern* of racketeering activity as "the plain

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arson, or fraud. It punishes, or provides a remedy for, the operation—acquisition, investment, maintenance, or conduct—of enterprises *through* racketeering activity or as a *result* of racketeering activity. Nothing of the sort is alleged here." (emphasis in original).

meaning of § 1964(c)." It therefore saw "no basis for inferring that Congress did not intend what it plainly said" and rejected Bankers' argument that the statute's legislative history justified wiping away the clearly drawn lines between predicate acts and the pattern of racketeering. 741 F.2d at 517; App. 15a.[7]

Applying that principle to the allegations of the complaint, the Court below properly concluded that Bankers' sole cognizable injury flowed directly from an alleged act of bankruptcy fraud in 1976 which prevented collection of an outstanding debt. 741 F.2d at 517-18; App. 17a-18a. This was an individual predicate act[8] for which Bankers already possessed a remedy under federal law. As there was no "pattern" and no violation of § 1962, dismissal of Bankers' complaint was held to be mandated by the language of the statute.

B. The Legislative History Of RICO Does Not Support Bankers' Interpretation Of The Statute

Although Bankers attempts to invoke the "plain meaning" of the statute, the thrust of its argument is to seek support in RICO's "long and complex" legislative history. However, the legislative history referred to (Petition at 15-17) relates primarily to the criminal provisions of RICO and to remedies avail-

---

7 *Sedima* was in accord with the decision below in holding that § 1964(c) requires allegation of a distinct RICO injury. *Sedima* affirmed dismissal of the complaint because it failed to allege the *kind* of injury at which the statute was directed, *i.e.*, injury to "investors and competitors" when "mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market." 741 F.2d at 495-96; App. 74a. The test in *Sedima*, if applied in this case, would also support dismissal of Bankers' complaint.

8 The Court below, noting the possibility that any alleged fraudulent scheme could be fragmented so that different phases are characterized as different statutory violations, commented that a determination of the sufficiency of such fragmented allegations was "a matter best left, in the first instance, to the discretion of the district judge." 741 F.2d at 518 n.7; App. 17a n.7.

able to the government. Indeed, by repeatedly stressing Congress' intention of fighting "organized criminal activity," Bankers only highlights the inapplicability of the civil provisions of RICO to an ordinary commercial dispute involving the nonpayment of a bank loan.

In any event, the statute's legislative history offers little insight into the intention of Congress and provides no basis for overturning the Second Circuit's analysis of the statute's framework. To begin with, that history is extremely sparse. As the decision below noted,

> "the terms of § 1964(c) were not discussed at all in the Senate, whose final RICO bill did not contain a provision for a private right of action, [while] the discussions in the House of Representatives centered almost entirely on the provision of civil remedies to be enforced by the government rather than by private parties." 741 F.2d at 517; App. 15a.

The Court below (741 F.2d at 517; App. 16a) found that its analysis of the limited scope of § 1964(c) was consistent with the sole explanation of that section presented on the floor of either house:

> "[The section] provide[s] that private persons injured by reason of *a violation of the title* may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35,295 (1970) (remarks of Rep. Poff) (emphasis supplied).

In *Sedima* v. *Imrex*, *supra* n.5, another panel of the Second Circuit engaged in a comprehensive exploration of the legislative background of § 1964(c). 741 F.2d at 488-92; App. 58a-66a. It noted that Congress had debated several proposals for civil weapons to fight organized crime and that virtually all of these were to be employed by the government. The primary issue relating to private civil actions which Congress considered was how closely such actions should parallel private antitrust

suits.[9] No attention was given to the possibility, much less the wisdom, of displacing existing common or statutory law, or of authorizing a treble damages award for a wrong already compensable by actual damages. Section 1964(c) itself was added in the House, some time after the main outlines of the bill—which contained no provision for private remedies—had passed the Senate.

At the end of this discussion, *Sedima* stated:

> "The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications." 741 F.2d at 492; App. 66a.

As correctly noted in *Sedima*, the most striking aspect of the legislative history of § 1964(c) is its "clanging silence." *Id.*

Brushing aside this scholarly inquiry into the statute's origins, Bankers would invoke Congress' "clanging silence" to argue that the decision below should be reversed because the

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9 No light is shed on the legislative history of § 1964(c) by the statement of the Antitrust Section of the American Bar Association (Petition at 16) concerning the interrelationship between existing antitrust and proposed anti-organized-crime legislation. The ABA statement showed only that concepts of standing and causation applied in antitrust cases might not be appropriate for statutes designed to fight organized crime. The statement was not directed at the specific language of § 1964(c) and does not support an unreasonably broad application of that provision in the manner suggested by Bankers.

legislative history of § 1964(c) contains "nothing that suggests" a limitation on the type of injury required to sustain a civil RICO claim. Petition at 15. However, such an argument rests on a faulty understanding of the courts' proper role in applying new statutes. As the Second Circuit correctly perceived when it refused to extend the reach of § 1964(c), courts should not depart from established rules of law without an express statement of legislative intent. The Court below interpreted the civil provisions of RICO in a manner consistent with related laws, both federal and state, heeding the admonition that when a statute is not clear, it should be construed "with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions." *United States* v. *Bass*, 404 U.S. 336, 344 (1971).

Bankers would read the legislative silence as justifying a radical shift in the traditional allocation of jurisdiction between state and federal courts. To the contrary, this Court has frequently stated that the sensitive balance in our federal system is not to be upset unless expressly authorized by Congress. Thus, for example, in securities law cases this Court has, at times, declined to recognize federal causes of action: "Absent a clear indication of congressional intent, we are reluctant to federalize [a] substantial portion of the law of corporations." *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479 (1977). *Accord: Cort* v. *Ash*, 422 U.S. 66, 84 (1975). This Court has also been wary of disturbing the federal-state balance in the antitrust context:

> "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940).

Or, as this Court explained in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941), "in ascertaining the scope of congressional legislation a due regard for a

proper adjustment of the local and national interests in our federal scheme must always be in the background."

Furthermore, this Court has warned that "absurd results are to be avoided." *United States* v. *Turkette*, *supra*, 452 U.S. at 580. As this Court observed in *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932):

> "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. . . . The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes."

Thus, the Court below was properly sensitive to its judicial obligation to interpret a statute in the face of the "clanging silence" of the legislature. It fulfilled that obligation by looking to the policy of the statute as a whole in order to preserve and maintain legal harmony.[10] If, in fact, Congress concludes that civil provisions with the far-reaching and disruptive consequences Bankers advocates are desirable, it can, by legislation, alter the effect of the decision below.

Bankers invokes *United States* v. *Turkette*, *supra*, as authority for the proposition that, in enacting RICO, Congress intended to federalize large bodies of state common law. Petition at 15. A fair reading of *Turkette* shows, however, that it considered only the Congressional intent to "alter somewhat

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10 *See also In re Action Industries Tender Offer*, 572 F. Supp. 846, 850 (E.D. Va. 1983) ("Congress did not intend for RICO to be used by private plaintiffs to claim treble damages for ordinary violations of criminal and tort laws. The fact that the statute specifically requires a violation of Section 1962 and not just a violation of two or more predicate acts (listed in Section 1961) demonstrates that alleging predicate acts alone is not sufficient to maintain a civil RICO claim"); *Harper* v. *New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) ("Congress could not have intended to provide treble damages causes of action to persons whose only injury stems directly from the predicate acts alone. It is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury").

the role of the Federal Government in the war against organized crime." 452 U.S. at 589. Nothing can be inferred from *Turkette* about the scope or purpose of private civil RICO.[11]

There is a further reason to conclude that Congress did not intend the massive expansion of civil litigation in the federal courts that would result from Bankers' expansive reading of § 1964(c). A few months before the enactment of RICO, a bill was passed that created 58 new federal district judgeships. As the House Report to Senate Bill 952 (Pub. L. 91-272, codified in 28 U.S.C. § 133) makes plain, Congress was fully aware in 1970 of "the delay and confusion" in the district courts. The House Report noted with concern the "record backlogs" caused by the "sharp" increase from the preceding year of both civil and criminal filings. 1970 U.S. Code Cong. & Ad. News 3221, 3224.

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11 Bankers cannot draw any support from Congress' direction that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act, § 904(a). Petition at 9. That direction does not absolve the courts of their obligation to look at "Congress' intent when it passed the legislation [rather than to make] unverifiable guesses as to what its intent would be" in procedural and factual contexts not contemplated by the statute. *Aetna Casualty and Surety Co.* v. *Liebowitz*, 730 F.2d 905, 908-09 (2d Cir. 1984).

It is notable that, in enforcing the criminal provisions of RICO, the Department of Justice has admonished prosecutors not to commence prosecutions "which are far afield from [its] Congressional purpose" because "the RICO statute, more so than most other Federal criminal sanctions, requires particularly careful and reasoned application." Department of Justice RICO Guidelines, *United States Attorneys' Manual*, Tit. 9, Ch. 110 (adopted Jan. 30, 1981), *reprinted in* ABA, Division of Professional Education, *RICO: The Ultimate Weapon in Business and Commercial Litigation*, Vol. I, Tab D-1, Attachment B (1983).

Among other things, these Guidelines discourage RICO indictments "which merely duplicate[] the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud [or] wire fraud" case. At the same time they require centralized authorization by Department officers before a RICO criminal case can proceed. The impact of the decision below will similarly inhibit the inappropriate or duplicative use of the civil provisions of RICO.

It would be illogical to assume that a legislature actively seeking to solve the problem of severely overcrowded dockets would, without comment or explanation, simultaneously enact legislation dramatically expanding the *civil* jurisdiction of the federal courts to encompass cases normally (and competently) handled by state courts and bankruptcy courts.

C. The Purported Conflict In The Courts Of Appeals Does Not Support A Grant Of Certiorari In This Case

Bankers also argues (Petition at 18-22) that certiorari should be granted on the ground that the decision below conflicts with decisions in three other circuits.[12] The decision below does not, however, conflict with the holdings of either the Fifth or Eighth Circuits cited by Bankers. Although there is a direct conflict with the Seventh Circuit, that conflict is not such as to warrant a grant of certiorari in this case.

1. The decision below is not in conflict with the holdings of the Fifth and Eighth Circuits.

Bankers cites three decisions of the Fifth and Eighth Circuits, none of which held that a private RICO plaintiff has standing to sue for treble damages purely on the basis of injury caused by individual predicate acts. Either the courts construed the complaints before them as alleging an injury arising as a result of a pattern of racketeering activity or they declined to address the question.[13] Analysis of these decisions renders

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12 In support of its "conflict" argument Bankers cites a number of district court decisions as well. These add no weight to its petition. As a general matter, conflicts between decisions of a court of appeals and of a district court are not a sufficient basis for petitioning for certiorari. *See* Stern & Gressman, *Supreme Court Practice* (5th ed. 1978) at 278-79; Rule 19(1)(b) of this Court. Moreover, a substantial number of district courts have independently construed § 1964(c) in a manner consistent with the decision below. *See Sedima, supra*, 741 F.2d at 493 n.34; App. 68a n.34.

13 Following the filing of the decision below, two other Circuits, the Third and the Fourth, issued decisions relating to civil claims under RICO, but neither referred to the decision below or dealt with the

questionable Bankers' contention that "[t]he other Circuits that have considered this issue would uphold Bankers' right to sue." Petition at 19.

In *Alcorn County* v. *U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984), a supplier was accused of selling goods at inflated prices, of bribing the purchaser's employee and of receiving payments for materials never delivered. In reviewing a decision rendered following a trial, the Fifth Circuit did not decide whether commission of predicate acts alone could constitute a "violation of § 1962"; instead it assumed that the bribery constituted the predicate act and that the fraudulent billing ("procured by bribery and threats" [731 F.2d at 1169]) was a compensable injury. No inference can be drawn as to how that Court would approach the present case.[14]

In *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982), *on reh.*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied*, 104 S.Ct. 527 (1983), plaintiffs, elderly residents of a retirement community, alleged that the community had been financially mismanaged and subjected to corruption in consequence of which plaintiffs were in danger of losing the "life-care" which they had been promised. The Eighth Circuit focused primarily on the definition of a RICO "enterprise." However, in reversing dismissal of the RICO count, it noted that plaintiffs adequately alleged the conduct of the affairs of an enterprise distinct from a pattern of racketeering so as to support their claim that the cause of their injury was *not* merely attributable to the individual acts of mail or wire fraud alleged. 685 F.2d at 1059 n.5.

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issues raised herein. *Seville Industrial Machine Corp.* v. *Southmost Machinery Corp.*, 742 F.2d 786 (3d Cir. 1984) and *Battlefield Builders, Inc.* v. *Swango*, 743 F.2d 1060 (4th Cir. 1984).

14 Nor can any inference be drawn from the Fifth Circuit's prior decision, *Owl Construction Co.* v. *Ronald Adams Contractor, Inc.*, 727 F.2d 540 (5th Cir.), *cert. denied*, 53 U.S.L.W. 3237 (Oct. 1, 1984), which considered only whether organized crime allegations were required.

The Court further held that the alleged injury rose to a level *beyond* that flowing from the isolated wrongful acts of the defendants, carefully distinguishing predicate acts of racketeering from a violation of § 1962(c). 685 F.2d at 1060-61.

In *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984), the Court held sufficient a complaint by an accounting firm alleging that it was damaged by a scheme involving predicate acts of mail and wire fraud which misled it into rendering a favorable audit. The injury was "theft of services," *i.e.*, the uncompensated excessive work that the plaintiff had to perform because of the fraud, together with legal expenses in an SEC investigation and loss of reputation.

Significantly, the Eighth Circuit recognized that a complaint seeking to recover merely for predicate-act injury was insufficient; however, it held that plaintiff had met its pleading burden:

> "[I]t is clear that Grant's complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We conclude that these allegations sufficiently plead an injury 'by reason of' a RICO violation." 742 F.2d at 413.

While noting that the interpretation of the applicable provisions of RICO in the *Bankers Trust* decision was "far narrower" than its own, *Grant* explicitly recognized that the two decisions were consistent. 742 F.2d at 413.[15] Bankers thus has no basis for alleging a conflict with the Eighth Circuit.

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15 *Grant* rejected the "mobster" injury requirement of *Sedima* (742 F.2d at 413); *see* n. 7, *supra*.

2. The conflict with the Seventh Circuit does not support a grant of certiorari in this case.

The Seventh Circuit's decision in *Haroco, Inc.* v. *American National Bank & Trust Co.*, No. 83-2529 (7th Cir. Oct. 19, 1984), does conflict with the decision below. However that decision incorrectly analyzes the applicable law and does not support Bankers' petition for a writ in the present case.

Haroco involved miscalculation of interest by a bank. The complaint alleged a RICO violation on the ground that the bank had committed mail fraud by charging plaintiff corporations interest in excess of "one per cent over the bank's prime rate," the rate specified in a loan agreement. Slip op. at 2.

The District Court held that plaintiffs had alleged an injury arising only from the predicate acts of mail fraud; it dismissed the complaint as failing to state a RICO violation. 577 F. Supp. 111 (N.D. Ill. 1983). Although the Seventh Circuit recognized that "it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank," it nonetheless reinstated the complaint because "Congress appears to have preferred a broad statute, even if overinclusion might result." Slip op. at 29.[16]

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16 Although sustaining the complaint, *Haroco* expressed doubt that Congress had actually intended that RICO apply to the fact-pattern before it. Similar doubts previously had been expressed by other Seventh Circuit panels. Thus, in *Schacht* v. *Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 104 S.Ct. 508 (1983), the Court wrote:

> "Congress, by granting both plaintiff and defendant status to 'any person' who possesses the rudimentary connection with the operation of an enterprise through predicate offenses or who suffers injury therefrom, may well have created a runaway treble damage bonanza for the already excessively litigious. . . . The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime."

Similarly in *Sutliff, Inc.* v. *Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984), the Court wrote:

> "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of

In reaching this conclusion *Haroco* incorrectly rejected, without any reasoned explanation, both the analysis of RICO's legislative history in *Sedima* and the statutory analysis in the *Bankers Trust* decision. Under *Haroco*, virtually any plaintiff, by adding allegations of "mail fraud" or "wire fraud," can convert a common law action into a federal action for treble damages. As previously shown, there is no basis in the legislative history to support such a radical shift in the traditional allocation of jurisdiction between the state and federal courts.

In summary, the decision below does not conflict with the holdings of the Fifth and Eighth Circuits. Because the conflict with *Haroco* reflects a misreading by the Seventh Circuit of the statute's text and legislative purpose, that conflict does not support a grant of certiorari in this case.[17]

> organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes. [citations omitted]. We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about."
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> The Seventh Circuit's method of statutory interpretation lacks persuasiveness. Its approach indicates an inability to recognize the significance of the "clanging silence" of Congress as to the civil provisions of RICO. The Seventh Circuit's rationale may not, in the circumstances, be viewed as an appropriate exercise of deference to legislative judgment. By drawing carefully restrained inferences from the statute's language, purpose and legislative history, the Second Circuit, it is submitted, reached the proper conclusion as to the requirement of a RICO injury.

17 Bankers also makes a tentative attempt (Petition at 9-10, 21-22) to argue for a grant of certiorari on the basis of an alleged conflict *within* the Second Circuit involving the decision below, *Sedima* and *Furman* v. *Cirrito*, 741 F.2d 524 (2d Cir. 1984) [App. 107a-27a], *petition for cert. filed sub nom. Joel* v. *Cirrito*, 53 U.S.L.W. 3343 (Oct. 15, 1984) (No. 84-604). This argument is devoid of merit. Any conflict within the Second Circuit would be a matter for the Second Circuit, not this Court, to resolve. *See Davis* v. *United States*, 417 U.S. 333, 340 (1974). But there is no conflict. The holdings of all three cases were consistent. Although the *Furman* panel expressed its disagreement with the other

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EVEN IF A DISTINCT RICO INJURY NEED NOT BE ALLEGED, CERTIORARI SHOULD NOT BE GRANTED

Whether or not the Second Circuit was correct in its reading of the RICO injury requirement, sound reasons of judicial economy favor the denial of Bankers' petition:

(a) review is premature until the civil provisions of RICO receive further interpretation by the lower federal courts or until Congress is given an opportunity to act;

(b) even if the RICO injury requirement set forth in the decision below reflects an erroneous reading of the statute, the simple breach of contract claim alleged by Bankers cannot support its civil RICO claim; and

(c) if this case were remanded, Bankers' complaint would have to be dismissed on grounds unrelated to RICO, *i.e.*, its claims are within the exclusive jurisdiction of the bankruptcy court and are barred by the statute of limitations.

A. Review Of The RICO Injury Requirement At This Time Would Be Premature

In reviewing petitions for certiorari this Court has considered, among other things, whether a grant of the petition would be either premature, because the legal context for applying the statute remains unclear, or futile, because the statutory provision at issue may soon be modified. Both of these tests apply to this case.

Thus, it has been stated that certiorari will be denied where it "may be desirable to have different aspects of an issue further illuminated by the lower courts." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J.). This Court has also recognized that it may at times be unwise to

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two decisions, it recognized that those decisions had to be followed. *Furman* should be viewed as essentially a dissenting opinion, not a manifestation of intracircuit conflict.

pass "upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

In the present case these principles militate strongly against granting the writ. Although RICO was enacted in 1970, its employment in private treble-damage actions is a very recent phenomenon. The overwhelming majority of the decisions in the lower courts have concerned matters of pleading, with little scrutiny of the facts. It is therefore appropriate for this Court to allow a further development of decisional law in the lower courts to enable the identification of significant issues of scope and applicability.

The other reason why granting the petition would be premature is that the statute may soon be modified. This Court has, at times, declined to accept cases where the likelihood that a statute will soon be modified either makes review unnecessary or minimizes the future importance of the question presented. *See Sanks* v. *Georgia*, 401 U.S. 144, 149-53 (1971); *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940).

Whatever the obscurities in the statute's previous history, Congress is now aware of the problems and complexities surrounding civil RICO. On October 5, 1984, the chairman of the Senate Judiciary Committee stated:

> "[W]hen we acted on this RICO statute as part of the Organized Crime Control Act of 1970, I think it is fair to observe that we might not have envisioned the full use of the statute by private civil litigants to include a civil RICO count in their ordinary business litigation alleging misstatements and fraud.
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> * * *
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> It is, therefore, imperative that the Congress hold hearings as soon as possible on this issue to determine if the intention of the Congress in enacting RICO is being carried out, and, if not, what legislative changes are necessary to bring that about. It is my intention to hold such hearings as soon as possible next year after the Congress convenes." 130 Cong. Rec. 13,350 (remarks of Sen. Thurmond).

In view of the distinct possibility that Congress might act soon to amend the statute, a decision at this time in the present case might be of little lasting significance.

B. Bankers' Simple Breach Of Contract Claim Cannot Support A RICO Action

Review of the need for a distinct RICO injury is not appropriate in this case because Bankers' alleged injury does not fall even within a broad reading of RICO. Bankers' alleged injury arises from a simple breach of contract as to which no fraud in the inducement is alleged; thus, the later independent acts of respondents cannot provide the required connection to a violation of RICO.

Cases decided under the antitrust laws demonstrate that traditional tort or contract claims may not be converted into violations of federal law so as to support federal jurisdiction or treble damages. Relief under the antitrust laws is available only for injuries that flow "from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), this Court stated that to assert a claim under the antitrust laws a plaintiff must allege a "causal connection" between the antitrust violation and the harm he has suffered. Typically, courts rest their causal analysis on the requirement in section 4 of the Clayton Act, 15 U.S.C. § 15, that the injury be "by reason of" an antitrust violation, a verbal formula that also appears in § 1964(c).

When, as in Bankers' case, the alleged injury resulted solely from a tort or a breach of contract, courts routinely hold that no antitrust claim is stated. Thus, in *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980), the Court declined to find that " 'mere' unfair business practices or business torts" (such as disloyal acts by corporate officials) were federal antitrust violations. An "essential connection" with the antitrust laws also was found lacking in a claim arising from a breach of a contract, allegedly for anti-competitive

reasons, on the ground that the contract itself was not violative of those laws. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). *See also Snyco, Inc.* v. *Penn Central Corp.*, 551 F. Supp. 949 (E.D. Pa. 1982).

Similarly, in *Fields Productions, Inc.* v. *United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir.) (*per curiam*), *cert. denied*, 401 U.S. 949 (1971), it was held that the cause of the plaintiff's injury was not an antitrust violation, but an improper allocation of profits derived from block booking of motion pictures. The District Court explained:

> "[I]t is difficult to see how the block booking could have caused injury to [the] plaintiff, incidental or not. . . . This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract. . . . That would seem to be plaintiff's proper remedy."[18]

Thus even if, in the abstract, the question of a distinct RICO injury requirement presented an appropriate issue for review at this time, Bankers' petition should nevertheless be denied. Regardless of the correctness of the statutory interpretation below, Bankers' injury flows not from any violation of RICO but from a simple breach of contract. Accordingly, whether or not *Haroco* is correct, certiorari should be denied here.

C. The Complaint Is Subject To Dismissal On Other Grounds

A final reason for denying certiorari is that Bankers' complaint would still be subject to dismissal even if no distinct

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18 *Cf. Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Significantly, within a single term, this Court denied certiorari to both *Mulvey* and *Fields*, in the face of the express statement in *Mulvey* that "[w]e disagree with the contrary conclusion on the standing issue reached by the Second Circuit, per curiam. . . ." 433 F.2d at 1076 n.4. Thus, contrary to Bankers' apparent belief, the mere existence of a direct conflict between two circuits does not, in itself, provide a sufficient basis for the issuance of a writ of certiorari.

RICO injury allegation were required because: (i) the bankruptcy court has exclusive jurisdiction of the claim asserted; and (ii) Bankers' claim is barred by the statute of limitations.

1. The bankruptcy court has exclusive jurisdiction.

Any cause of action for damages arising from the alleged concealment of the Brookfield asset belongs to BAC, not Bankers, and arises exclusively from matters within the purview of the pending BAC bankruptcy proceeding.[19] Only BAC or, if an order for relief is entered, its trustee, has standing to assert such a claim. Moreover, the determination as to whether it should be pursued must, in the first instance, be presented to the bankruptcy court. Bankers may not treat BAC's claim as its own and bypass BAC's pending bankruptcy proceeding (*see* note 2, *supra*) to pursue independently any alleged rights of BAC's creditors under RICO.

2. Bankers' claim is time barred.

Because Congress did not provide an express statute of limitations for RICO, the state limitations period governing

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19 *See Gochenour* v. *George & Frances Ball Foundation*, 35 F. Supp. 508 (S.D. Ind. 1940), *affirmed as "sound" and opinion adopted by reference as the opinion of the Court of Appeals*, 117 F.2d 259 (7th Cir.) (*per curiam*), *cert. denied*, 313 U.S. 566 (1941), a class action by creditors commenced while a bankruptcy proceeding was pending. In *Gochenour*, the complaint charged that defendants had realized improper profits by conspiring to acquire the debtor's assets at an inadequate price. The District Court (35 F. Supp. at 515) held that the cause of action was an asset within the jurisdiction of the bankruptcy court and that the debtor in possession, which owned such asset, had the exclusive right to maintain the action.

See also Gochenour v. *Cleveland Terminals Bldg. Co.*, 118 F.2d 89, 93 (6th Cir. 1941) (creditors' claims were claims of the debtor in possession over which the bankruptcy court had exclusive jurisdiction); *Graybar Electric Co.* v. *Doley*, 273 F.2d 284, 292 (4th Cir. 1959); *Rothstein* v. *Seidman & Seidman*, 410 F. Supp. 244, 250 (S.D.N.Y. 1976); and *Sloan* v. *Clark*, 18 N.Y.2d 570, 575, 277 N.Y.S.2d 411, 223 N.E.2d 893 (1966).

analogous actions is applied.[20] Under New York law, which is controlling here, the longest limitations period arguably available is six years.[21]

A claim such as Bankers' accrues "when plaintiff first suffered a loss as a result of defendant's fraudulent conduct." *Rice* v. *Baron*, 456 F. Supp. 1361, 1368 (S.D.N.Y. 1978). *Accord*: *Stull* v. *Bayard*, *supra*, 561 F.2d at 432. As previously noted, the plan of arrangement which, according to Bankers, improperly relieved BAC of $4.3 million in debt, was approved by the bankruptcy court in March 1976. 741 F.2d at 513; App. 7a. Thus, any injury arising from the alleged fraudulent discharge of BAC accrued no later than March 1976.

The alleged "consummation" of the concealment scheme several months later—when Brookfield was supposedly returned to BAC—is irrelevant for limitations purposes. A party injured by a continuing course of conduct "may bring suit as soon as the damage to him is inflicted; he obviously need not wait until the termination of the conspiracy which caused it . . . and the statute therefore begins to run at the moment such injury occurs."[22]

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20 *See, e.g.*, *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980); *Armstrong* v. *McAlpin*, 699 F.2d 79 (2d Cir. 1983); *IIT* v. *Cornfeld*, 619 F.2d 909, 928 (2d Cir. 1980); *Stull* v. *Bayard*, 561 F.2d 429, 431 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

21 Section 213(8), N.Y. Civil Practice Law and Rules (McKinney ed. 1972). *See Estee Lauder, Inc.* v. *Harco Graphics, Inc.*, 82 Civ. 8188 (CBM) (S.D.N.Y. March 21, 1984); *Prudential Lines, Inc.* v. *McKeon*, 80 Civ. 5853 (MJL) (S.D.N.Y. April 21, 1982); *contra*, *Teltronics Services, Inc.* v. *Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984) (three-year statute); *cf. Durante Bros. and Sons, Inc.* v. *Flushing National Bank*, 571 F. Supp. 489 (E.D.N.Y. 1983).

22 *Rutkin* v. *Reinfeld*, 229 F.2d 248, 252 (2d Cir.), *cert. denied*, 352 U.S. 844 (1956). *Accord*: *Korry* v. *International Telephone & Telegraph Corp.*, 444 F. Supp. 193, 195 (S.D.N.Y. 1978). *See also Dolmetta* v. *Uintah National Corp.*, 712 F.2d 15 (2d Cir. 1983), holding that New York's six-year fraud statute began to run when the plaintiff bank "suffered some loss as a result of defendants' fraudulent acts". The Court rejected as "artificial and unconvincing" plaintiffs' attempt to

Only if subsequent acts causing injury take place within the statutory period may a new claim be asserted, and even that claim must be limited to the additional damage allegedly inflicted. Thus, the repetition of a particular wrong does not revive a time-barred claim; it merely provides the basis for a new claim if the repetition itself causes further damage.[23]

Bankers also may not claim the benefit of the doctrine of fraudulent concealment. Not only did its complaint fail to comply with the requirements for pleading that doctrine (*see, e.g.*, *Armstrong* v. *McAlpin*, *supra*, 699 F.2d at 88-89) but, more significantly, even if the doctrine of fraudulent concealment were sufficiently alleged, Bankers' claims still would be barred. Under N.Y. Civil Practice Law and Rules § 203(f) (McKinney ed. 1972), claims alleging fraudulent concealment as a basis to toll an otherwise expired statute of limitations

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avoid this conclusion by characterizing a subsequent transfer of assets acquired with funds embezzled from plaintiffs as a fraud "separate and distinct" from the original embezzlement. It stated:

> "The [subsequent] transfer did not represent a new and separate loss to the Bank. Rather, the conveyance was at most a post-fraud secretion designed to preserve the success of a fraud that had occurred long since." 712 F.2d at 19.

See also Woodbridge Plastics, Inc. v. *Borden, Inc.*, 473 F. Supp. 218, 221 (S.D.N.Y.), *aff'd*, 614 F.2d 1293 (2d Cir. 1979), citing *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F.2d 1029, 1035 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977) and *Rice* v. *Baron*, *supra*, 456 F. Supp. at 1368.

Nor may Bankers successfully claim that respondents' conduct constituted a "continuing wrong" as to which the statute did not begin until the conduct terminated. *See, e.g.*, *Korry* v. *International Telephone & Telegraph Corp.*, *supra* (the statute of limitations begins to run at the moment injury occurs) and *Sporn* v. *MCA Records, Inc.*, 58 N.Y.2d 482, 462 N.Y.S.2d 413, 448 N.E.2d 1324 (1983).

23 In *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234 (1st Cir. 1977), plaintiffs argued that their claims accrued on the date of the last overt act committed in furtherance of a civil conspiracy, pointing to purported overt acts of certain defendants in 1973-75 to hold open claims arising from acts committed in 1971-72. The Court rejected this contention and dismissed the claims.

must be asserted within two years from the time the wrongdoing was, or with reasonable diligence should have been, discovered.

Here, Bankers' claim accrued in March 1976 and, as is clear from its commencement of a proceeding to revoke confirmation of the BAC plan in September 1976, Bankers had discovered the alleged wrongdoing by that date. Thus, under the controlling authorities,[24] the right to pursue a claim for relief based upon the alleged concealment of the Brookfield asset expired no later than March 1982—six years from the accrual of the claim in March 1976 (CPLR § 213[8])—since such date was later than September 1978—two years from discovery of the alleged wrong (CPLR § 203[f]). Because Bankers' claim was not asserted within the applicable period, it is time barred; the fact that it was asserted within *six years* of discovery is of no legal consequence.

Thus, even if a distinct RICO injury were not required, the fact that the decision below would be affirmed on other grounds argues strongly against granting Bankers' petition.

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24 *Hoff Research & Development Laboratories, Inc.* v. *Philippine National Bank*, 426 F.2d 1023, 1025-27 (2d Cir. 1970); *Cestaro* v. *Mackell*, 429 F. Supp. 465 (E.D.N.Y.), *aff'd*, 573 F.2d 1288 (2d Cir. 1977); *Rickel* v. *Levy*, 370 F. Supp. 751, 755-56 (E.D.N.Y. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

November 21, 1984

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
DEC 6- 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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12 pp

TABLE OF CONTENTS

	PAGE
TABLE OF CASES AND AUTHORITIES	iii
PRELIMINARY STATEMENT	1
I. THIS CASE SATISFIES THE MOST IMPORTANT CRITERIA FOR SUPREME COURT REVIEW	2
II. THE DISTRICT COURT HAD, AND THIS COURT HAS JURISDICTION OVER THIS CASE	5
CONCLUSION	7

TABLE OF CASES AND AUTHORITIES

Cases	PAGE
Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984)	3
In re Beck Industries, Inc, 479 F.2d 410 (2d Cir.), *cert. denied*, 414 U.S. 858 (1973)	6
Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983)	6
Bizzell v. Hemingway, 548 F.2d 505 (4th Cir. 1977)	6
Callaway v. Benton, 336 U.S. 132 (1949)	6
Haroco, Inc. v. American National Bank & Trust Company, No. 83-2529 (7th Cir. Oct. 19, 1984)	2, 3, 4
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979)	4
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1967)	2
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978)	4
Seville Industrial Machinery Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146 (D.N.J. 1983), *rev'd on other grounds*, No. 83-5575 (3d Cir. Sept. 6, 1984)	3
Stone v. Powell, 428 U.S. 465 (1976)	2
Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648 (7th Cir. 1984)	6
Teledyne Industries, Inc. v. Eon Corporation, 401 F. Supp. 729 (S.D.N.Y. 1975), *aff'd*, 546 F.2d 495 (2d Cir. 1976)	6
Weinberger v. Rossi, 456 U.S. 25 (1982)	2

PAGE

Statutes and Legislative Materials

18 U.S.C. § 1961(1)(D) 6

18 U.S.C. § 1962(c) 5

18 U.S.C. § 1964(c) 5

Supreme Court Rule 17 2

Supreme Court Rule 17.1(a) 2

Supreme Court Rule 17.1(c) 2

Criminal Laws and Procedures, Hearings on S. 2187, 2188, 2189, 2190 and 2578 before the Subcomm. on the Judiciary, 89th Cong., 2d Sess. (1966) 5-6

130 Cong. Rec. 13,350 (1984) (Remarks of Senator Thurmond and Senator DeConcini) 4-5

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BANKERS TRUST COMPANY,

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DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioner, Bankers Trust Company ("Bankers"), respectfully submits this reply to the opposition briefs of respondents Herman Soifer (the "Soifer Brief") and Daniel Rhoades, et al. (the "Rhoades Brief").

Respondents argue that (i) the decision below was correct and not worthy of review and (ii) that the district court had no jurisdiction over this case. Respondents also argue non-jurisdictional issues that were not considered below and are not

raised in the petition for certiorari.[1] Such issues need not and should not be considered here. *Weinberger v. Rossi*, 456 U.S. 25, 36 n.18 (1982) ("Because this question was neither raised in the petition for certiorari nor reached by the Court of Appeals, we do not consider it."); *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976) (". . . only in the most exceptional cases will we consider issues not raised in the petition.").

I.

THIS CASE SATISFIES THE MOST IMPORTANT CRITERIA FOR SUPREME COURT REVIEW

Respondents acknowledge, expressly or by implication, that this case satisfies the most important criteria for granting a petition for certiorari (Supreme Court Rule 17):

First, the issue here involves an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 17.1(c). The decision below practically eliminates an express private civil remedy enacted by Congress. *See, Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1967) (certiorari granted because the rulings of the Court of Appeals "seemed to threaten the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States.")

Second, the decision below directly conflicts with that of the Seventh Circuit in *Haroco, Inc. v. American National Bank & Trust Company*, No. 83-2529 (7th Cir. Oct. 19, 1984). Supreme Court Rule 17.1(a). Since *Haroco* expressly repudiated the Second Circuit's decision in this case, respondents are reduced to arguing that the decision below does not also conflict with decisions of other circuits. Soifer Brief, p. 16. Respondents,

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1 The non-jurisdictional issues raised by respondents include the state law statute of limitations and the characterization of this case as a "contract" claim rather than a claim under RICO. Soifer Brief, pp. 22-27.

however, misread the decisions of the Fifth and Eighth Circuits, which do conflict with the decision below, as the Seventh Circuit concluded in *Haroco*, slip op. at 27-28. Moreover, other court of appeals cases cited by Soifer (Soifer Brief, pp. 13-16), while not expressly discussing the injury issue, strongly suggest that they too would disagree with the decision below.

In *Seville Industrial Machinery Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146 (D.N.J. 1983), *rev'd on other grounds*, No. 83-5575 (3d Cir. Sept. 6, 1984) (Soifer Brief, pp. 13-14n.), the district court rejected defendants' argument that a RICO claim required "an injury different from the harm which results to a plaintiff from violations of the underlying predicate offenses." 567 F. Supp. at 1157. The district court characterized such a requirement as "artificial and unwarranted by the language of the RICO statute", citing commentators who noted that such a requirement "could lead to the anomalous result of denying standing to persons concededly the direct victims of racketeering injury." *Id.* Further, the court stated that "most courts which have sustained civil RICO complaints have accorded standing to the direct victims of the predicate acts without any need for the additional element of a 'racketeering enterprise injury.' " *Id.* Nevertheless, the district court dismissed the RICO claim on other grounds (failure to plead an "enterprise" and lack of particularity). The Third Circuit's reversal should be deemed an approval of the district court's ruling on the injury issue.

Similarly, *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984) suggests that the Fourth Circuit would also sustain Bankers' complaint. The injury alleged there, the paying of money to defendants, was a direct result of the alleged predicate acts (extortion and attempted extortion to extract more money from plaintiff than the parties' contract provided). The Fourth Circuit found that the complaint stated a claim for relief—a holding contrary to that of the decision below.

Finally, the acknowledged conflict between the Seventh and Second Circuit is deeper than a mere disagreement between panels of two circuits. The Second Circuit's three decisions below were filed, after the circuit judges denied *en banc* consideration, by agreement of the entire court. *Haroco* reveals that no judge of the Seventh Circuit favored a rehearing *en banc*, notwithstanding the recognized conflict with the Second Circuit. The result is, in effect, irreconcilable *en banc* decisions of two circuits.

The Soifer Brief (p. 22) argues that review is inappropriate because there is "the distinct possibility that Congress might soon act to amend the statute," but cites only cases where the statute had *already* been changed. In fact, contrary to Soifer's argument, even where there has been legislative action affecting a case prior to this Court's review, review has been granted where appropriate. *See, New York City Transit Authority v. Beazer*, 440 U.S. 568, 579-80 (1979); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537-38 (1978).

Moreover, there is hardly a "likelihood" that RICO will be amended. Soifer's argument is based on Senator Thurmond's recommendation that hearings be held on RICO. Senator Thurmond's full remarks (as opposed to Soifer's excerpts) focused on the "uncertainties" in the interpretation of civil RICO caused by the conflicts among the lower federal courts (specifically referring to the *Sedima* decison):

> "As a result of the varying judicial interpretations of RICO, numerous questions now exist with respect to legislation which was designed to be a vital addition to our arsenal of weapons against organized crime. *These questions and uncertainties have undermined the effectiveness of this weapon* and must be resolved" (emphasis added).

130 Cong. Rec. 13,350. Similarly, Senator DeConcini, referring to the call for hearings, said that "These hearings will provide the forum *to determine whether* or not the civil RICO language

needs to be modified, clarified *or left unchanged*." (emphasis added) The most that can be said is that RICO may at some time be amended, which is true of every statute this Court construes. *Id.*

II.

THE DISTRICT COURT HAD, AND THIS COURT HAS JURISDICTION OVER THIS CASE

Respondents contend that certiorari should be denied on jurisdictional grounds, arguing that Bankers' claim belongs exclusively to the bankrupt Braten Apparel Corporation ("BAC") or its representative. According to respondents (i) Bankers lacks standing and (ii) the Bankruptcy Court has exclusive jurisdiction of this claim. Soifer Brief, p. 24; Rhoades Brief, pp. 4-6, 8.

Respondents' standing argument is specious. Their argument in effect, is that their wholly-owned corporate tool is the *only* plaintiff who may sue them under RICO. This would render meaningless the statutory language giving a claim to "any" person, such as Bankers, injured in his business or property.[2] 18 U.S.C. §§ 1962(c), 1964(c).

Respondents' argument that the Bankruptcy Court has exclusive jurisdiction is also without merit—Bankers' claim is directly against the defendants who are not in bankruptcy, and RICO expressly places jurisdiction in the district court. 18 U.S.C. § 1964(c). That respondents' conduct has made Bankers unable to collect its debt from an insolvent BAC does not strip the district court of jurisdiction. To the contrary, Congress' concern with injuries of this nature was one reason it enacted RICO. *See*, Criminal Laws and Procedures, Hearings on S. 2187, 2188, 2189, 2190 and 2578 before the Subcomm. on the Judiciary, 89th Cong., 2d Sess. 204 (1966):

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2 Respondents' argument also ignores the injuries done to Bankers that clearly did not also damage BAC, such as Bankers' legal expenses in South Carolina and elsewhere.

> " . . . [D]eliberate bankruptcy is an alarming new nationwide phenomenon. Crime syndicates install ostensibly honest front men in business to order merchandise on credit, then loot and legally bankrupt the firm . . . But since these manipulations are almost impossible to prove, creditors are left holding the bag . . . .
>
> ". . . It is estimated that lone operators, copying Mafia techniques, bankrupt at least a thousand smaller businesses each year."

That bankruptcy frauds were made predicate offenses under RICO refutes any suggestion that injuries from such frauds were intended to be outside the scope of civil RICO actions. *See* 18 U.S.C. § 1961(1)(D). *See also*, *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984) (upholding RICO claim of creditors of bankrupt company against persons who caused the bankruptcy).

Even in non-RICO cases, a creditor may sue a bankrupt's officers and directors in district court for fraud involving a contract between the creditor and the bankrupt. *See e.g.*, *Teledyne Industries, Inc. v. Eon Corporation*, 401 F. Supp. 729 (S.D.N.Y. 1975), *aff'd*, 546 F.2d 495 (2d Cir. 1976). *See also*, *Callaway v. Benton*, 336 U.S. 132, 142 (1949); *Bizzell v. Hemingway*, 548 F.2d 505 (4th Cir. 1977); *In Re Beck Industries, Inc.*, 479 F.2d 410 (2d Cir.), *cert. denied*, 414 U.S. 858 (1973).

Bankers is not precluded from suing under RICO by the fact that other BAC creditors have also suffered from respondents' conduct. If BAC's other creditors see fit to bring RICO suits against the defendants, as the Rhoades Brief (p. 6) suggests, RICO permits them to do so. *Cf. Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *aff'd*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied sub nom. Presidential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983), in which the RICO claim was brought as a class action.

There is no little irony in respondents' argument that Bankers should be restricted to the remedies available in Bankruptcy Court. Respondents perverted the bankruptcy law and its processes during the period 1974 though 1976 and did so again in early 1982, as their earlier frauds were about to be undone. Thus, their mockery of the bankruptcy law and the Bankruptcy Court has brought Bankers here, and it was for such criminal conduct that the remedies of RICO were intended.

Because Bankers has a direct claim under RICO against the respondents, Bankers has standing to sue, and the related argument that the Bankruptcy Court has exclusive jurisdiction must be rejected.[3]

CONCLUSION

For the foregoing reasons, respondents' arguments in opposition to Bankers' petition for a writ of certiorari should be rejected and the writ should issue.

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December 3, 1984

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3 The Rhoades Brief's argument (p. 8) that the case is moot appears to rest exclusively on Bankers' purported lack of standing, and therefore is also without merit for the reasons given above.